82-1058

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals impermissibly intruded upon the exclusive constitutional authority of Congress to appropriate money when it ordered payment of $382 million in disputed claims out of funds appropriated for fiscal year 1981 that had already reverted to the Treasury, notwithstanding a 1982 appropriations measure enacted during the pendency of this litigation that prohibits payment of the claims "from this or any other appropriation."

PARTIES TO THE PROCEEDING

The petitioners are Richard S. Schweiker, Secretary of Health and Human Services, and the Department of Health and Human Services. The respondents are the States of Connecticut, Illinois, Maryland, Michigan, New Jersey, New York, Oklahoma, Pennsylvania, Wisconsin and California.

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The Solicitor General, on behalf of the Secretary of Health and Human Services and the Department of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-42a) is reported at 684 F.2d 979. The opinion of the district court (App. E, *infra*, 47a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982 (App. B, *infra*, 43a-44a), and a petition for rehearing was denied on September 22, 1982 (App. C, *infra*, 45a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 7 of the Constitution of the United States provides in relevant part:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *

2. Section 306 of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 530-531, 42 U.S.C (Supp. IV) 1320b-2 and 1320b-2 note, provides in relevant part:

> (a) Part A of title XI of the Social Security Act is amended by adding after section 1131 the following new section:
>
> PERIOD WITHIN WHICH CERTAIN CLAIMS MUST BE FILED
>
> SEC. 1132. (a) Notwithstanding any other provision of this Act (but subject to subsection (b)), any claim by a State for payment with respect to an expenditure made during any calendar quarter by the State—
>
> (1) in carrying out a State plan approved under title I, IV, V, X, XIV, XVI, XIX, or XX of this Act, or
>
> (2) under any other provision of this Act which provides (on an entitlement basis) for Federal financial participation in expenditures made under State plans or programs,
>
> shall be filed (in such form and manner as the Secretary shall by regulations prescribe) within the two-year period which begins on the first day of the calendar quarter immediately following such calendar quarter * * *.
>
> (b) The Secretary shall waive the requirement imposed under subsection (a) with respect to the filing of any claim if he determines (in accordance with regulations) that there was good cause for the failure by the State to file such

claim within the period prescribed under subsection (a). * * *

* * * * *

[(b)](3) In the case of such expenditures made in calendar quarters commencing prior to October 1, 1979, for which no claim has been filed on or before the date of enactment of this Act, payment shall not be made under this Act on account of any such expenditure unless claim therefor is filed (in such form and manner as the Secretary shall by regulation prescribe) prior to January 1, 1981.

* * * * *

(c) Notwithstanding any other provision of law, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically exempts such filing or payment from the provisions of this section.

3. The Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*, incorporated the following provision of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act of 1982, H.R. 4560, 97th Cong., 1st Sess. 38 (1981):[1]

Notwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act, no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred.

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[1] The procedural background of this provision is explained at page 10 note 7, *infra*.

STATEMENT

Respondents, ten states who are eligible for federal reimbursement of expenditures incurred in the administration of public assistance programs under certain titles of the Social Security Act, 42 U.S.C. (& Supp. IV) 301 *et seq.*, challenged the refusal of the Secretary of Health and Human Services (HHS) to reimburse them for various past expenditures. During the pendency of this litigation, Congress enacted an appropriations measure for fiscal year (FY) 1982 that prohibits payment of respondents' claims "from this or any other appropriation." Accordingly, the government contended that, whatever the merits of respondents' lawsuit at the time of filing, this subsequently enacted legislation prohibited the court of appeals from ordering payment of respondents' claims. Without explanation, the court of appeals held to the contrary and ordered the Secretary to pay respondents' claims, if otherwise properly allowable, out of any remaining unobligated FY 1981 funds. We seek this Court's review only on this so-called question of "relief." For the sake of completeness, however, we first describe the underlying merits litigation.

1. Prior to FY 1980, there was no time limit for the filing of state claims for reimbursement under various Social Security Act programs.[2] The absence of time lim-

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[2] These programs include Old Age Assistance, 42 U.S.C. 301 *et seq.*; Aid to Families with Dependent Children, 42 U.S.C. (& Supp. IV) 601 *et seq*; Child Welfare Services, 42 U.S.C. (& Supp. IV) 620 *et seq*; Work Incentive Program for Recipients of Aid Under State Plan Approved Under Part A, 42 U.S.C. (& Supp. IV) 630 *et seq.*; Child Support and Establishment of Paternity, 42 U.S.C. (& Supp. IV) 651 *et seq.*; Federal Payments for Foster Care and Adoption Assistance, 42 U.S.C. (Supp. IV) 670 *et seq.*; Aid to the Blind, 42 U.S.C. 1201 *et seq.*; Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351 *et seq.*; Aid to the Aged, Blind and Disabled, 42 U.S.C. 1381 note *et seq.*;

its had caused considerable budgetary uncertainty, to the consternation of congressional appropriations committees. See, *e.g.*, *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 126 (1979); H.R. Rep. No. 95-1746, 95th Cong., 2d Sess. 17 (1978); 125 Cong. Rec. S15128 (daily ed. Oct. 25, 1979). Accordingly, in the FY 1980 Departments of Labor-HEW[3] Appropriations Act, H.R. 4389, 96th Cong., 1st Sess. (1979), both Houses agreed to a provision that prohibited "payments from this appropriation to reimburse state or local expenditures made prior to September 30, 1978."[4] The bill passed the House of Representatives on August 2, 1979 (125 Cong. Rec. H7129-H7131 (daily ed. Aug. 2, 1979)), but it was never enacted into law because of a dispute over federal funding for abortions. Thus, there was no appropriations bill for HEW in FY 1980; instead, Congress enacted two continuing resolutions to fund HEW operations during that year. Act of Oct. 12, 1979, Pub.

"Medicaid," 42 U.S.C. (& Supp. IV) 1396 *et seq.*; and Social Services, 42 U.S.C. (1970 ed.) 1397 *et seq.*

[3] At the time this controversy first arose, administration of the programs at issue in this litigation was vested in the Department of Health, Education, and Welfare (HEW). Section 509 of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 695, redesignated HEW as the Department of Health and Human Services.

[4] Although this provision, on its face, appeared to prohibit the payment of any claims for expenditures made prior to September 30, 1978, the conference report shows that Congress only meant to prohibit payment of claims not filed within one year of the date of expenditure. H.R. Conf. Rep. No. 96–400, 96th Cong., 1st Sess. 18 (1979).

L. No. 96-86, 93 Stat. 656 *et seq.*; Act of Nov. 20, 1979, Pub. L. No. 96-123, 93 Stat. 923 *et seq.* These continuing resolutions incorporated by reference H.R. 4389's one-year time limit on the payment of retroactive claims by appropriating funds (Pub. L. No. 96-86, 93 Stat. 659; Pub. L. No. 96-123, 93 Stat. 925) (emphasis added):

> as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriation Act, 1980 (H.R. 4389), at a rate of operations, *and to the extent and in the manner*, provided for in such Act as adopted by the House of Representatives on August 2, 1979 * * *.

At the same time that Congress took up the question of time limits for state claims in the FY 1980 appropriations process, it was also considering substantive legislation to impose permanent time limits. This effort culminated in the passage, on June 17, 1980, of Section 306 of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 530. For the future, Section 306(a), 94 Stat. 530, provided that state claims have to be filed within two years of the expenditure. For so-called "prior-period" claims, Section 306(b), 94 Stat. 530, provided that there would be no time limit for the payment of claims for pre-October 1, 1979 expenditures if those claims had been filed prior to the date of enactment of Section 306, and that pre-October 1, 1979 expenditures not filed prior to Section 306's enactment had to be filed by January 1, 1981. The Secretary of HHS later extended this date, as allowed by Section 306(b), to May 15, 1981 (46 Fed. Reg. 3527 (1981)).

Because Congress intended Section 306 to be a permanent solution to the problem of setting time limits on the filing of state claims, it added the following subsection to Section 306 (Section 306(c), 94 Stat. 531):

> Notwithstanding any other provision of law, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically exempts such filing or payment from the provisions of this section.

Soon after passage of Section 306, however, Congress revived the one-year time limit contained in H.R. 4389. Having again failed to reach agreement on an appropriations bill, Congress enacted another continuing resolution to fund HHS operations during FY 1981. In the Act of Oct. 1, 1980, Pub. L. No. 96-369, 94 Stat. 1351 *et seq.*, Congress provided that the Secretary could spend FY 1981 funds only under "the conditions provided in" H.R. 4389 as passed by the House on August 2, 1979. As already noted, H.R. 4389 prohibited payment of state claims not filed within one year of the expenditure. During the course of FY 1981, two more continuing resolutions were passed with virtually identical provisions, including the incorporation by reference of H.R. 4389. Act of Dec. 16, 1980, Pub. L. No. 96-536, 94 Stat. 3166 *et seq.*; Supplemental Appropriations and Rescission Act of 1981, Pub. L. No. 97-12, Section 401, 95 Stat. 95.

2. This apparent clash between Section 306's time limits for filing claims and the one-year time limit of the FY 1981 appropriations resolutions led to the filing of this lawsuit. The Secretary took the position that the 1981 continuing appropriations resolutions were a restriction on the availability of appropriated funds and that he was therefore precluded from using FY 1981 funds to pay state claims filed more than one year after the date of expenditure. See 46 Fed. Reg. 23273 and 46135 (1981).

In their lawsuit, filed on September 15, 1981, the respondent states contested the Secretary's interpretation of the 1981 appropriations measures. They sought

a declaration that the 1981 appropriations resolutions did not prohibit payment of their claims for expenditures incurred prior to September 30, 1978, so long as those claims had been filed by May 15, 1981, as provided in Section 306.[5] Because of respondents' concern that all remaining HHS FY 1981 funds were due to revert to the Treasury at the close of the fiscal year on September 30, 1981 (see 31 U.S.C. 701(a)(2), amended and renumbered by Pub. L. No. 97-258, 96 Stat. 935, 31 U.S.C. 1552(a)(2)), respondents also sought a temporary restraining order and preliminary injunction directing the Secretary to set aside $382 million in 1981 funds and hold them available to pay the prior period claims (App. A, *infra*, 12a).[6]

The United States District Court for the District of Columbia approved an expedited schedule that brought respondents' motion for a preliminary injunction and the government's motion to dismiss the complaint for failure to state a claim before the court on September 28, 1981. Two days later, on the last day of fiscal year 1981, the district court granted the government's motion and dismissed the complaint (App. F, *infra*, 54a). The district court accepted the government's position that even though respondents' prior-period claims had been timely filed under Section 306, the Secretary

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[5] All of the claims in this litigation were filed prior to May 15, 1981, but none was filed within one year of the date of expenditure (see App. A, *infra*, 2a, 10a).

[6] The original complaint was filed by the State of Connecticut and six other states. These seven respondents sought an order directing the Secretary to set aside $196 million, which corresponded to the amount of their prior-period claims. Respondents subsequently amended the complaint to add two additional states as plaintiffs, and the district court granted the State of California leave to intervene. The $382 million figure includes the prior-period claims of the additional plaintiff states and the intervenor State of California (see App. A, *infra*, 1a-2a, 11a-12a n.13).

was prohibited by the 1981 continuing appropriations resolutions from using 1981 funds to pay prior-period claims that were filled with the Secretary more than one year after the date the underlying expenditures had been incurred (App. E, *infra*, 53a). The district court rejected as "untenable" the states' contention that Section 306(c) "was designed to control or limit all subsequent appropriations bills or that it controlled the continuing appropriations resolutions for FY 1981" (App. E, *infra*, 52a). The states had been unable to cite "one instance" where Congress had "set out to control yearly appropriations in an authorizing statute" (*ibid.*). The court stated that the 'absence of any precedent" for the states' position was "not surprising" (*ibid.*). It warned that acceptance of the states' position, that an authorizing statute such as Section 306 could prevent Congress from withholding appropriations to carry out its provisions, "would play havoc with the appropriations process and would drastically alter the legislative structure" (App. E, *infra*, 52a).

In summary, the district court concluded that the states' pending retroactive claims "were timely [filed] under Section 306," but that the Secretary "will be unable to pay them with FY 1981 appropriations" (App. E, *infra*, 53a). Recognizing that the court had no power "to compel Defendants to pay money that has not been appropriated by Congress," the court dismissed the complaint (*ibid.*).

3. Although the FY 1981 funds sought by respondents became unavailable at the close of that fiscal year, respondents nevertheless appealed the judgment of the district court. Between the time respondents and the government filed their respective appellate briefs, Congress enacted a continuing appropriations resolution for FY 1982, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*, which incorporated a provision barring payment of prior-period claims such as respondents' from "any"

appropriation. The provision, which explicitly overrode Section 306, stated:

> Notwithstanding section 306 * * * no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under [relevant titles] of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred.[7]

In its brief for the appellees, the government defended the decision of the district court on the merits and also argued that, in any event, enactment during the pendency of the appeal of Pub. L. No. 97-92, barring payment of respondents' claims from "any" appropriation, precluded the grant of relief to respondents (Br. for Appellees 66). In their reply brief, respondents did not explain what they thought "any" appropriation meant; they simply stated that "Public Law 97-92 only

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[7] This provision was contained in the 1982 appropriations act for HHS, which was passed by the House of Representatives on October 6, 1981. H.R. 4560, 97th Cong., 1st Sess. 38 (1981). See 127 Cong. Rec. H7097 (daily ed. Oct. 6, 1981). The Senate version of H.R. 4560, containing the identical provision, was reported by the Senate Appropriations Committee to the full Senate on November 9, 1981. H.R. 4560, 97th Cong., 1st Sess. 45-46 (1981). See 127 Cong. Rec. S13145 (daily ed. Nov. 9, 1981). As the court of appeals acknowledged (App. A, *infra*, 34a n.28), because H.R. 4560 was passed by the House and reported to the Senate, "the provisions of the bill were incorporated into the second continuing appropriations resolution for fiscal year 1982. Act of Dec. 15, 1981, Pub. L. No. 97-92, § 101(a)(1)-(3), 95 Stat. 1183 (1981)."

Although Pub. L. No. 97-92 was due to expire on March 31, 1982, Congress extended it for the balance of FY 1982. Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22. Congress has also acted to prohibit the payment of respondents' prior-period claims during FY 1983, see note 13, *infra*.

incorporates provisions of pending 1982 HHS appropriation bills to the extent necessary to govern 1982 spending in the absence of an enacted appropriation law * * *. It does not affect in any way the availability of funds appropriated in 1981" (Reply Br. of Nine Appellant States 20 n.*).

4. The court of appeals reversed the judgment of the district court (App. A, *infra*, 1a-42a). Reasoning that the issue in this case was not the availability of funds but rather "whether the claims were timely filed" (App. A, *infra*, 21a), the court held that the time limits established by Section 306 for the filing and payment of prior-period claims controlled over the more restrictive time limits established by the 1981 continuing appropriations resolutions, and that the Secretary was not prohibited by those 1981 resolutions from paying respondents' claims. Stated differently, the court of appeals held that even if the 1981 appropriations resolutions were read as incorporating the one-year time limit contained in H.R. 4389, that "incorporation was ineffective because it did not comply with section 306(c)" (App. A, *infra*, 34a).

The court of appeals also rejected, without explanation, the government's argument that enactment of Pub. L. No. 97-92 during the pendency of the appeal, barring payment of claims such as respondents' from "any" appropriation, precluded the grant of relief to respondents. In a brief footnote, the court of appeals stated only (App. A, *infra*, 41a n.36):

> We also reject the Government's argument that the words "any other appropriation" that were incorporated into Pub. L. No. 97-92, * * * have the effect of barring payment of the disputed claims from 1981 as well as 1982 appropriations. *See* Appellees' Brief at 66. [8]

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[8] In the text of its opinion the court of appeals contradictorily, and erroneously, stated that "neither side has argued that

Instead, relying on its decision in *Jacksonville Port Authority* v. *Adams*, 556 F.2d 52, 55-57 (D.C. Cir. 1977), the court of appeals ruled that it had equitable authority to compel the Secretary to pay respondents' claims from remaining 1981 funds that had reverted to the Treasury.[9] The court added that "'[o]ur authority under 28 U.S.C. § 2106 to fashion an appellate remedy in the interest of justice' * * * permits us to avoid" the "highly unjust result" that respondents "are no longer eligible for injunctive relief" (App. A, *infra*, 41a, quoting 556 F.2d at 57).[10]

REASONS FOR GRANTING THE PETITION

The court of appeals in this case committed an egregious ($382 million) and inexplicable error of constitutional dimension that only this Court can correct. In the name of equity, the court of appeals ordered the Secretary of HHS to pay respondents' claims from 1981 appropriated funds, in clear disregard of an Act of Congress that expressly prohibits payment of these claims from "any" appropriation. Article I, Section 9, Clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." It is settled that the courts may not use their equitable powers to compel a federal officer to pay money that Congress has refused to appropriate. *Reeside* v. *Walker*, 52 U.S. (11 How.) 271,

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Congress' action in the 1982 appropriations laws has any bearing on whether Congress precluded payment of those claims from the fiscal year 1981 appropriations" (App. A, *infra*, 40a). See Br. for Appellees 66.

[9] The court of appeals stated that there was "no question" that Pub. L. No. 97-92 barred payment of respondents' claims from 1982 funds (App. A, *infra*, 33a-34a, 40a-41a).

[10] The court of appeals remanded the case to the district court for the purpose of determining the extent of remaining unobligated 1981 funds (App. A, *infra*, 41a).

290-291 (1850). Because the court of appeals clearly violated this constitutional command, its judgment should be reversed.

1. Pub. L. No. 97-92 incorporates a provision mandating that "no payment shall be made from this or any other appropriation" to pay respondents' claims. The court of appeals correctly acknowledged that this provision bars payment of respondents' claims from FY 1982 funds (App. A, *infra*, 33a-34a, 40a-41a). Yet, at the same time, it held that this provision does not bar payment of respondents' claims from remaining unobligated 1981 funds that have reverted to the Treasury (*id.* at 41a n.36). In other words, the court of appeals gave force to the words "this * * * appropriation" but not to the words "or any other appropriation." The court gave no reason for its refusal to apply the words "or any other appropriation" to bar payment of respondents' claims from remaining unobligated 1981 funds, which is in "violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

Congress plainly intended to prevent payment of respondents' claims from *any* existing funding source, not merely 1982 appropriated funds. As this Court has stated on numerous occasions, "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' * * * and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used * * *.'" *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 5, quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The language employed by Congress in Pub. L. No. 97-92 expressly bars payment of respondents' claims from "any" appropriation. The ordinary meaning of "any" is *any*, and we submit that "any" necessarily

includes remaining unobligated 1981 appropriations that have reverted to the Treasury. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) (emphasis in original; footnote omitted) ("the phrase[] 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action").[11]

2. There can be no question that the court of appeals was bound to apply Pub. L. No. 97-92 even though it was enacted during the pendency of respondents' appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969). Accord, *e.g.*, *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974).[12] The rule applies with special force here, in light of Chief Justice Marshall's admonition in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801), that "in great national concerns [as contrasted with 'mere private cases between individuals'] * * * the court must decide according to existing laws * * *." Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981).

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[11] The court of appeals decided that the 1981 continuing appropriations measures did not effectively override Section 306 because they did not mention it (App. A, *infra*, 34a). Although the government adheres to the position that payment of respondents' claims was barred by the 1981 appropriations measures, there can be no dispute that the 1982 appropriations measure, Pub. L. No. 97-92, effectively overrode Section 306, because it expressly applies "[n]otwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act." Because Pub. L. No. 97-92 is so clearly dispositive of this case, we do not ask this Court to review the underlying merits of the litigation.

[12] The court of appeals seemed reluctant to follow this well-settled rule because to do so "would, in practical effect, change our decision on the merits" (App. A, *infra*, 41a). That is, of course, the inevitable result of the rule requiring adherence to Congress' judgments.

In *Bradley*, the Court noted that only "manifest injustice" or statutory direction or legislative history to the contrary could justify a departure from this rule. *Bradley* v. *School Board*, *supra*, 416 U.S. at 711. The *Bradley* exceptions have no bearing on this case.

First, there is nothing in the language or legislative history of Pub. L. No. 97-92 that would justify deciding this case without reference to that statute. On the contrary, it is readily apparent that the only purpose of the incorporated provision in Pub. L. No. 97-92 was to prohibit payment of the very claims involved in this litigation out of 1982 "or any other" appropriations.[13]

Second, no manifest injustice results from applying Pub. L. No. 97-92 to this case. In *Bradley*, the Court identified three factors to consider in determining whether application of intervening legislation to a pending case might be unjust: (1) the nature and identity of the parties, (2) the nature of their rights, and (3) the nature of the impact of the change in the law on those rights. *Bradley* v. *School Board*, *supra*, 416 U.S. at 717. The Court in *Bradley* concluded that the public nature of the litigation distinguished that case from "'mere private cases between individuals,'" (*ibid*, quoting *United States* v. *The Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110), and found no injustice in subjecting a publicly funded governmental entity (a school board) to additional monetary liability. Here, too, the respondent states are governmental entities, engaged in litigation of national concern.

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[13] Under Section 306, the deadline for filing prior-period claims was May 15, 1981 (see page 6, *supra*). Thus, by the time Congress enacted Pub. L. No. 97-92 on December 15, 1981, prior-period claims could no longer be filed by the established deadline. That is why Pub. L. No. 97-92 refers to claims that "had been" filed. Therefore, the *only* prior-period claims that Congress could have had in mind when it enacted Pub. L. No. 97-92 were the claims involved in this litigation.

The Court in *Bradley* also stated that it would not apply an intervening legislative enactment when to do so would infringe upon rights that have matured or become unconditional. Because judgment in the district court was entered in favor of the federal government, and respondents had not secured a final judgment in their favor prior to the enactment of Pub. L. No. 97-92, respondents' "right" to reimbursement from remaining 1981 funds has never unconditionally matured. *McCullough* v. *Virginia*, 172 U.S. 102, 123-124 (1898). Equally important, this case does not require the Court to decide the substantive merits of respondents' claims to reimbursement for their past expenditures. Instead, the only issue that must be decided is whether the court of appeals could properly force the Secretary of HHS to pay the disputed claims over Congress' clear refusal to appropriate the necessary funds. There is, of course, no reason why Congress may not "consign [respondents' claims] to the fiscal limbo of an account due but not payable." *United States* v. *Will*, 449 U.S. 200, 224 (1981). Accordingly, the final prong of the *Bradley* test is not met here.[14]

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[14] It is noteworthy that for FY 1983 Congress again took up the question of payment of respondents' prior-period claims. It did so by enacting a continuing appropriations resolution that leaves the claims intact pending final disposition of this case, but defers payment, if any, until FY 1984. Act of Oct. 2, 1982, Pub. L. No. 97-276, Section 136, 96 Stat. 1197. The conference report on this version states (128 Cong. Rec. H8252 (daily ed. Sept. 30, 1982)):

> The language agreed to is not intended to prejudice the outcome of this court case either on behalf of the government or for the States. The position of the Congress on this issue has already been amply expressed through its action on the fiscal year 1980, 1981 and 1982 appropriations bills and related continuing resolutions. The amendment is, however, intended to prohibit payment of any of these claims during fiscal year 1983.

Notwithstanding the fact that this case fails to satisfy the *Bradley* criteria for "manifest injustice," the court of appeals invoked its decision in *Jacksonville Port Authority* v. *Adams*, 556 F.2d 52 (D.C. Cir. 1977), to hold that it had equitable power to prevent the lapse of budget authority in order to provide respondents with meaningful relief that would have been available had the district court entered judgment in their favor prior to the end of FY 1981. See also *National Association of Regional Councils* v. *Costle*, 564 F.2d 583 (D.C. Cir. 1977); *City of Los Angeles* v. *Adams*, 556 F.2d 40 (D.C. Cir. 1977); *National Association of Neighborhood Health Centers, Inc.* v. *Mathews*, 551 F.2d 321, 338-339 (D.C. Cir. 1976). These cases, even if correctly decided, are inapplicable here. As the court of appeals explained in *Jacksonville Port Authority* v. *Adams*, *supra*, 556 F.2d at 55-57, the doctrine there invoked is one of "equity and justice." But equity does not permit the courts to create budgetary authority that Congress has expressly denied. *Reeside* v. *Walker*, *supra*, 52 U.S. at 290-291; *Cummings* v. *Hardee*, 102 F.2d 622, 627-628 (D.C. Cir. 1939); *Cloutier* v. *Morgenthau*, 88 F.2d 846, 848 (D.C. Cir. 1937). Indeed, in *National Association of Regional Councils* v. *Costle*, *supra*, 564 F.2d at 589, the court of appeals itself recognized this limitation:

> Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities.

Accordingly, the court of appeals was bound to apply the incorporated provision in Pub. L. No. 97-92 to deny relief to respondents.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the error of the court of appeals is so apparent, the Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1982

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2090

STATE OF CONNECTICUT, ET AL., and
STATE OF CALIFORNIA, PLAINTIFF-INTERVENOR,
APPELLANTS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-2237)

Argued April 27, 1982

Decided July 27, 1982

Before EDWARDS and BORK, *Circuit Judges*, and DUDLEY B. BONSAL, *United States Senior District Judge* for the Southern District of New York.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* In this case we are called upon to determine whether Congress appropriated funds in fiscal year 1981 to reimburse the ten appellant States for expenditures they incurred prior to September 30, 1978 in operating various programs under the Social Security Act. The States submitted these "prior-period" claims for reimbursement, totalling approxi-

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*Sitting by designation pursuant to 28 U.S.C. 294(d) (Supp. IV 1980).

mately 382 million dollars, to appellee Department of Health and Human Services ("HHS"). HHS refused to process the claims, however, on the ground that they were not timely filed under the 1981 appropriations laws and thus could not be paid out of fiscal year 1981 funds. Appellants filed this suit for declaratory and injunctive relief, seeking to compel HHS to process the disputed claims and to have an appropriate portion of otherwise unobligated funds for fiscal year 1981 reserved for the payment of the pending claims.

Briefly stated, the central issue in this litigation involves an apparent conflict between two congressional enactments—a 1980 amendment to the Social Security Act and the continuing appropriations resolutions for HHS for fiscal year 1981. HHS contended before the District Court, as it does on appeal, that the 1981 continuing appropriations resolutions incorporated a restriction from an earlier appropriations bill. That restriction prohibited payment of claims for expenditures incurred prior to September 30, 1978 if the claims were not filed within one year after the expenditures were made. Because the appellant States did not meet this one-year time limit in filing the prior-period claims at issue here, HHS maintained that the claims could not be paid out of fiscal year 1981 funds. The District Court accepted this argument and dismissed appellants' suit.

Appellants contend that a 1980 amendment to the Social Security Act—section 306 of Public Law No. 96-272—established permanent time limits for filing claims for reimbursement, including the type of prior-period claims at issue in this case. Based principally on the language and legislative history of section 306, they argue that the time limits in that provision control in this case. Having complied with the provisions of section 306, appellants insist that HHS could not lawfully refuse to pay their prior-period claims out of fiscal year

1981 funds and that the District Court erred in dismissing their suit.

For the reasons set forth below, we agree that section 306 is controlling in this case and, consequently, that the 1981 appropriations laws do not prohibit the use of fiscal year 1981 funds to pay the prior-period claims filed by appellants in accordance with section 306. As explained below, we also reject the Government's contention that, under the circumstances of this case, appellants are no longer entitled to injunctive relief. We therefore reverse the District Court's decision and remand for the District Court to fashion appropriate relief.

I. Background

The states for many years have operated, in cooperation with the federal government, certain public assistance programs under the Social Security Act, 42 U.S.C. §§ 301-1397f (1976 & Supp. IV 1980).[1] Under the Act, the states are entitled to reimbursement for a specified percentage of their actual expenditures in operating the programs. To be eligible for reimbursement, the states must have a plan, approved by HHS, for each social security program in operation. HHS provides the federal funds, called "federal financial participation" ("FFP"), for reimbursement of the participating states. HHS generally makes grants to the states prior to each calendar quarter based on estimates of the

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[1] The programs under the Social Security Act that are relevant to this case include Title IV, Part A, 42 U.S.C. §§ 601-613 (1976 & Supp. IV 1980) (Aid to Families with Dependent Children); Title IV, Part B, 42 U.S.C. §§ 620-628 (1976 & Supp. IV 1980) (Child-Welfare Services); Title XVI, 42 U.S.C. §§ 1381-1383c (1976 & Supp. IV 1980) (Supplemental Security Income for the Aged, Blind, and Disabled); Title XIX, 42 U.S.C. §§ 1396-1396m (1976 & Supp. IV 1980) (Medical Assistance Programs ("Medicaid")); and Title XX, 42 U.S.C. §§ 1397-1397f (1976 & Supp. IV 1980) (Social Services).

states' anticipated expenditures. The states submit reports after each quarter showing their actual program expenditures. HHS eliminates any discrepancies between estimated and actual expenditures by adjusting the states' grants for the next calendar quarter. *See, e.g.*, 42 U.S.C. §§ 1396a-1396b (1976).

For a number of reasons, the states have regularly included in their quarterly reports previously unreported expenditures incurred in earlier quarters. Known as prior-period adjustments, these are, in effect, claims for reimbursement for earlier expenditures. Until 1980, the Social Security Act contained no time limits on submitting claims for prior-period expenditures. The absence of any time limits apparently made it more difficult for HHS to plan and administer the budget for the various Social Security Act programs. This case stems from Congress' efforts to deal with this problem.

A. *Relevant Legislation*

H.R. 4389. Both the House and the Senate passed provisions in the fiscal year 1980 appropriations bill for the Departments of Labor and Health, Education, and Welfare ("HEW") which stated: "No payment shall be made from this appropriation to reimburse State or local expenditures made prior to September 30, 1978." H.R. 4389, 96th Cong., 1st Sess. (1979); H.R. REP. NO. 400, 96th Cong., 1st Sess. 18 (1979) (Conference Report).[2] Despite the language suggesting otherwise, the

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[2] Earlier, in an appropriations bill for the Departments of Labor and Health, Education, and Welfare and Related Agencies for fiscal year 1979, H.R. 12929, 95th Cong., 2d Sess. (1978), the Senate Appropriations Committee included a provision requiring states to submit claims for Medicaid expenditures made prior to September 30, 1977 within 90 days after enactment of the bill. *See* S. REP. NO. 1119, 95th Cong., 2d Sess. 83 (1978). The provision was deleted in conference. *See* H.R. REP. NO. 1746, 95th Cong., 2d Sess. 16-17 (1978) (Conference Report); Part II.C. *infra*.

Conference Report on H.R. 4389 made clear that this provision was not intended to be an absolute bar to reimbursement of pre-September 30, 1978 expenditures; rather, the conferees stated, "This language provides for a one year limitation on the time period available to the States during which they can claim Federal matching funds for State or local expenditures" incurred prior to September 30, 1978. *Id.*

1980 Continuing Appropriations Resolutions. The conference version of H.R. 4389 never passed the Senate, however, because of an irreconcilable conflict with the House over a provision concerning federal funding of abortions. As a result, Congress never enacted a full appropriations statute for HEW for 1980. Instead, it adopted continuing appropriations resolutions that appropriated funds for HEW in accordance with the provisions of H.R. 4389 as it had passed the House. The resolutions appropriated

> [s]uch amounts as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriations Act, 1980 (H.R. 4389), at a rate of operations, and to the extent and in the manner, provided for in such Act as adopted by the House of Representatives on August 2, 1979 . . . .

Act of Oct. 12, 1979, Pub. L. No. 96-86, § 101(j), 93 Stat. 656, 659 (1979); Act of Nov. 20, 1979, Pub. L. No. 96-123, § 101(g), 93 Stat. 923, 925 (1979).[3]

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[3] Congress appropriated additional funds for fiscal year 1980 in the Supplemental Appropriations and Rescission Act, 1980, which was enacted on July 8, 1980. The Act provided additional funds to HHS for "Grants to States for Medicaid," but contained the following limitation:

> Notwithstanding any other provision of law, no payment shall be made from this appropriation to reimburse State or local expenditures made prior to October 1, 1977 unless a request for reimbursement had been officially trans-

Section 306. While the conference version of H.R. 4389 was still pending, Congress was also considering amending the Social Security Act itself to incorporate permanent time limits on state filings of reimbursement claims. Congress ultimately enacted these time limits as part of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 306, 94 Stat. 500, 530-31 (1980) (codified at 42 U.S.C. § 1320b-2 & note (Supp. IV 1980)) ("section 306"), which the President signed on June 17, 1980. Section 306(a) established a general two-year time limit on the filing of state claims for reimbursement.[4] Sections 306(b) and (c), which

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mitted to the Federal government by the State within two years after the fiscal year in which the expenditure occurred.

Pub. L. No. 96-304, tit. I, ch. IX, 94 Stat. 857, 885 (1980).

[4] Section 306(a) provided in full:

SEC. 306. (a) Part A of title XI of the Social Security Act is amended by adding after section 1131 the following new section:

"PERIOD WITHIN WHICH CERTAIN CLAIMS MUST BE FILED

"SEC. 1132. (a) Notwithstanding any other provision of this Act (but subject to subsection (b)), any claim by a State for payment with respect to an expenditure made during any calendar quarter by the State—

"(1) in carrying out a State plan approved under title I, IV, V, X, XIV, XVI, XIX, or XX of this Act, or

"(2) under any other provision of this Act which provides (on an entitlement basis) for Federal financial participation in expenditures made under State plans or programs,

shall be filed (in such form and manner as the Secretary shall by regulations prescribe) within the two-year period which begins on the first day of the calendar quarter immediately following such calendar quarter; and payment shall not be made under this Act on account of any such expenditure if claim therefor is not made within such two-year period; except that this subsection shall not be applied so as to deny payment with respect to any expenditure involving court-ordered retroactive payments or audit exceptions, or adjustments to prior year costs.

were added on the floor of the Senate, delineated the retroactive reach of section 306 by establishing the applicable limitations on payment for past expenditures. Section 306(b)(1) made the general, two-year time limit applicable only to claims for expenditures incurred on or after October 1, 1979.[5] Section 306(b)(2) provided that there would be no deadline for reimbursement of pre-October 1, 1979 expenditures for which a claim was filed before the date of enactment of section 306.[6] For pre-October 1, 1979 expenditures for which no claim had been filed by the date of enactment, section 306(b)(3) required that claims be filed before January 1,

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"(b) The Secretary shall waive the requirement imposed under subsection (a) with respect to the filing of any claim if he determines (in accordance with regulations) that there was good cause for the failure by the State to file such claim within the period prescribed under subsection (a). Any such waiver shall be only for such additional period of time as may be necessary to provide the State with a reasonable opportunity to file such claim. A failure to file a claim within such time period which is attributable to neglect or administrative inadequacies shall be deemed not to be for good cause."

Pub. L. No. 96-272, § 306(a), 94 Stat. 500, 530 (1980).

[5] Section 306(b)(1) provided:

The amendment made by subsection (a) shall be effective only in the case of claims filed on account of expenditures made in calendar quarters commencing on or after October 1, 1979.

[6] Section 306(b)(2) provided:

In the case of claims filed prior to the date of enactment of this Act on account of expenditures described in section 1132 of the Social Security Act made in calendar quarters commencing prior to October 1, 1979, there shall be no time limit for the payment of such claims.

1981.[7] (The Secretary of HHS later extended this deadline to May 15, 1981. *See* note 12 *infra*.) Finally, section 306(c) stated:

> Notwithstanding any other provision of law, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically exempts such filing or payment from the provisions of this section.

The dispute in this case turns largely on the interpretation of the terms of section 306(c).

1981 Continuing Appropriations Resolutions. Congress was again unable to pass an appropriations statute for HHS for fiscal year 1981.[8] Consequently, it again enacted continuing resolutions that appropriated funds for HHS programs for fiscal year 1981. The first Joint Resolution, enacted on October 1, 1980, stated:

> Whenever an Act listed in this subsection has been passed by only the House as of October 1,

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[7] Section 306(b)(3) provided:

> In the case of such expenditures made in calendar quarters commencing prior to October 1, 1979, for which no claim has been filed on or before the date of enactment of this Act, payment shall not be made under this Act on account of any such expenditure unless claim therefor is filed (in such form and manner as the Secretary shall by regulation prescribe) prior to January 1, 1981.

[8] The bill that was to be the 1981 appropriations act for HHS was never enacted by Congress. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 1981, H.R. 7998, 96th Cong., 2d Sess. (1980). In that bill, the House Appropriations Committee inserted language "prohibiting the Department [of HHS] from reimbursing States for State and local expenditures which were not submitted to the Federal Government within 2 years after the fiscal year in which the expenditure occurred." H.R. REP. NO. 1244, 96th Cong., 2d Sess. 71 (1980); *see* 126 CONG. REC. H7948-49 (daily ed. Aug. 27, 1980).

> 1980, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the House, whichever is lower, *and under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1980*, except section 201 of title II of the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriations Act, 1980 (H.R. 4389) as adopted by the House of Representatives on August 2, 1979 ....

Pub. L. No. 96-369, § 101(a)(4), 94 Stat. 1351, 1351-52 (1980) (emphasis added).[9] The second continuing appropriations resolution, enacted on December 16, 1980, contained a virtually identical provision for the funding of HHS projects. Pub. L. No. 96-536, § 101(a)(4), 94 Stat. 3166 (1980).[10]

The parties before us apparently disagree about whether the words "applicable appropriations Acts for the fiscal year 1980" refer directly to H.R. 4389, or to the 1980 continuing appropriations resolutions, which in turn incorporated the provisions of H.R. 4389. *See* Part II.A. *infra*. Under either interpretation, however, the 1981 continuing resolutions referred to and continued funding under the terms of H.R. 4389. HHS contends that the 1981 continuing resolutions thereby incorporated the one-year time limit on prior-period claims con-

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[9] Section 201 of H.R. 4389, known as the "Michel Amendment," which was excepted from the continuing appropriations resolution, reduced HEW's appropriations by $500 million. The reduction was to be achieved through the reduction of fraud, abuse and waste by the agency. *See* H.R. REP. No. 400, 96th Cong., 1st Sess. 25 (1979) (Conference Report on H.R. 4389).

[10] The provisions of Pub. L. No. 96-536 were extended to the end of fiscal year 1981 by the Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, § 401, 95 Stat. 14, 95 (1981).

tained in H.R. 4389.[11] Appellants argue that, because the 1981 continuing resolutions neither referred to the time limits in H.R. 4389 nor complied with the explicit exemption requirement of section 306(c), the time limits specified in section 306 must control in this case.

B. *Relevant HHS Rulemakings*

On January 15, 1981, HHS promulgated final regulations implementing section 306. As authorized by section 306(b)(4), HHS waived the January 1, 1981 deadline for filing claims based on expenditures incurred prior to October 1, 1979, and extended the deadline for filing such claims to May 15, 1981. 46 Fed. Reg. 3527, 3528 (1981).[12] All of the prior-period claims at issue in this case were filed by May 15, 1981.

On April 24, 1981, however, HHS published a proposed regulation that prevented the use of fiscal year 1981 appropriations to pay state claims for reimbursement of pre-September 30, 1978 expenditures unless

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[11] Conceivably, the language of this provision could also refer to the Supplemental Appropriations and Rescission Act, 1980, which contained a time limit on prior-period claims different from the one in H.R. 4389. *See* note 3 *supra*. The time limit in the 1980 Supplemental Act, however, is not a general limit for 1980, but a limit on payment of certain prior-period claims for a particular supplemental grant of Medicaid funds. None of the parties has suggested that the 1981 appropriations resolutions referred to or incorporated this time limit or any other provision of the 1980 Supplemental Act.

[12] Section 306(b)(4) allowed the Secretary of HHS to waive for good cause the filing requirements of § 306(b)(3) (which concerned pre-October 1, 1979 expenditures for which no claim had been filed before enactment of § 306). Pub. L. No. 96-272, § 306(b)(4), 94 Stat. 500, 531 (1980). In waiving the requirements, the Secretary explained: "[W]e are waiving the January 1, 1981 filing date and extending it to May 15, 1981, without States having to request a waiver. We find good cause for this waiver because States will need additional time to comply with these regulations." 46 Fed. Reg. at 3528.

the claims were filed within one year of the expenditures. 46 Fed. Reg. 23,273 (1981). This prohibition was based on HHS's belief that the 1981 appropriations resolutions incorporated the one-year time limit in H.R. 4389. Although HHS did not discuss section 306(c), it did note the "apparent inconsistency" between the filing deadlines in section 306 and those incorporated by reference into the fiscal year 1981 appropriations resolutions. HHS concluded that the appropriations resolutions were controlling because they were enacted later and because "section 306, as an authorizing statute, cannot have the effect of overriding the subsequently enacted appropriation restriction." 46 Fed. Reg. at 23,274.

HHS adopted the proposed rule in final form on September 17, 1981. 46 Fed. Reg. 46,134 (1981) (codified at 45 C.F.R. § 95.11 (1981)). In the preamble to the final rule, HHS provided a somewhat different explanation of why, "[e]ven in light of [section 306(c)]," the time limit incorporated in the 1981 appropriations laws controlled. HHS stated that Congress had enacted section 306(c) solely in response to H.R. 4389, which was still pending at that time, and that section 306(c) was therefore "inapplicable to laws subsequently enacted by Congress." 46 Fed. Reg. at 46,135. Thus, HHS concluded that section 306(c) did not apply to the subsequently enacted appropriations resolutions for fiscal year 1981.

C. *Proceedings Below*

Based on the position it adopted in its proposed rule, HHS refused to process appellants' claims for reimbursement of pre-September 30, 1978 expenditures unless they were filed within one year of the expenditures. On September 15, 1981, two days before publication of the final HHS rule, appellants filed this suit for declaratory and injunctive relief in the District Court.[13]

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[13] Suit was initially filed by the States of Connecticut, Maryland, Michigan, New Jersey, New York, Oklahoma and Wiscon-

The States sought a declaration that section 306 established the controlling time limits for the filing and payment of claims for federal matching funds for pre-September 30, 1978 expenditures and that the continuing appropriations resolutions for fiscal year 1981 did not bar the payment of such claims. They also sought an injunction directing HHS to treat as timely filed their claims based on pre-September 30, 1978 expenditures, which were filed by May 15, 1981, the applicable deadline under section 306, and to process and pay those claims to the extent they were otherwise allowable. *See* J.A. 11-12.[14] In addition, the States sought a temporary restraining order and preliminary injunction reserving and setting aside a portion of the remaining HHS appropriations for fiscal year 1981 to remain available for payment of the disputed claims. Record, Entry Nos. 2, 7. The requested restraining order and preliminary injunction were designed to prevent the remaining fiscal year 1981 funds from reverting to the general Treasury on October 1, 1981, as would otherwise occur by operation of 31 U.S.C. § 701(a)(2) (1976).[15]

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sin. On September 23, 1981, appellants amended their complaint to add two additional party-plaintiffs, the States of Illinois and Pennsylvania. *See* J.A. 3, 5. On September 24, 1981, the State of California filed a petition to intervene as a plaintiff, which the District Court granted on September 28, 1981. *See* J.A. 3.

[14] Appellants also sought to have 45 C.F.R. § 95.11, the HHS regulation interpreting the 1981 appropriations laws as prohibiting payment of claims for pre-September 30, 1978 expenditures not filed within one year, set aside as contrary to law. *See* J.A. 12.

[15] 31 U.S.C. § 701(a)(2) (1976) provides:

> Upon the expiration of the period of availability for obligation, the unobligated balance shall be withdrawn and, if the appropriation was derived in whole or in part from the general fund, shall revert to such fund, but if the appropriation was derived solely from a special or trust fund, shall revert, unless otherwise provided by law, to the fund from which derived: *Provided*, That when it is determined nec-

The appellees filed a motion to dismiss for failure to state a claim upon which relief could be granted. On September 28, 1981, the District Court heard oral argument on appellants' motion for temporary relief and appellees' motion to dismiss. At the hearing, the parties agreed to the court's suggestion that it render a final decision on the merits. On September 30, 1981, the District Court issued a memorandum opinion and order dismissing appellants' case for failure to state a claim upon which relief could be granted.

D. *The District Court Decision*

In granting appellees' motion to dismiss, the District Court accepted the same basic arguments presented by appellees on appeal. The court noted that both sides agreed (as they do on appeal) that section 306(c) was added to section 306 in response to the time limit provision in H.R. 4389, which was then pending before Congress. It adopted appellees' view that section 306(c) was enacted not to affect time limits contained in future appropriations bills, but "to prevent any confusion as to what the *substantive* law was on claim filing in the unlikely event that H.R. 4389 was passed in the same session as Section 306." J.A. 25 (emphasis in original). In the District Court's view, the legislative history of section 306 showed that the only purpose of section 306(c) was to ensure that, in the event that Congress subsequently enacted H.R. 4389, the time limits in that bill would not be interpreted as amending the substantive law on the filing of claims contained in section 306. Consequently, it rejected appellants' contention that section 306(c) controlled the continuing appropriations res-

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essary by the head of the agency concerned that a portion of the unobligated balance withdrawn is required to liquidate obligations and effect adjustments, such portion of the unobligated balance may be restored to the appropriate accounts.

olutions for fiscal year 1981. The court's decision was based in part on its reluctance to view section 306 as an effort by Congress "to control yearly appropriations in an authorizing statute." As the District Court put it, "to limit the appropriations process in an authorizing statute would play havoc with the appropriations process and would drastically alter the legislative structure." J.A. 25.

On October 7, 1981, appellants filed this appeal. They contend that the District Court erred in concluding that section 306(c) had no bearing on the construction of any appropriations laws. Given the proper interpretation of section 306, they argue, the fiscal year 1981 appropriations resolutions cannot be viewed as restricting the payment of prior-period claims according to the time limit on filing in H.R. 4389.

II. Availability of Fiscal Year 1981 Funds for Payment of the Disputed Prior-Period Claims

The Government's basic argument, accepted by the District Court below, is that the 1981 appropriations laws incorporated the one-year time limit on claims filing contained in H.R. 4389, and that nothing in section 306 affects the viability or validity of that incorporated provision. This argument revolves around a distinction the Government draws between appropriations laws and authorizing, or other substantive, legislation.

The Government maintains that section 306 established, as a matter of substantive law, permanent time limits on filing state claims for federal matching funds under the Social Security Act. The Government argues that those time limits created, in effect, a statute of limitations that would preclude payment of untimely claims. Nothing in section 306, however, appropriates funds for the payment of any claims, even those that are timely filed. Nor, according to the Government, does section 306 compel Congress to appropriate funds

to pay all claims that are timely filed under that section. The Government contends that Congress simply declined to appropriate adequate funds in fiscal year 1981 to pay all of the claims that were timely under section 306, using the one-year time limit in H.R. 4389 as the vehicle for limiting the appropriated funds. Thus, it argues that the one-year time limit in H.R. 4389, as incorporated in the 1981 appropriations laws, is merely a restriction on available funds and is wholly consistent with the provisions of section 306.

Section 306(c), which states that "there shall be no time limit for the filing or payment of . . . claims" other than those in section 306, unless the time limit is specifically exempted from section 306, plainly appears to contradict the Government's position. Relying on the legislative history, however, the Government contends that Congress intended section 306(c) to have a very limited effect. It argues that this provision was only added to section 306 so that, if H.R. 4389 were enacted after section 306 became law, the time limit in H.R. 4389 would not be interpreted as impliedly repealing, as a matter of substantive law, any of the time limits in section 306. Thus, according to the Government, section 306(c) was never intended to limit Congress' authority to restrict future social security appropriations or to affect the interpretation of future appropriations laws. Consequently, section 306(c) does not, as the Government puts it, "prospectively nullify" the restriction on payment of prior-period claims incorporated into the continuing appropriations resolutions for 1981.

As explained in detail below, we cannot accept the Government's position. We wish to emphasize at the outset, however, that our approach is a fairly narrow one. We need not consider the possible impact of section 306(c) upon any appropriations laws not before us in this case. Clearly, we are not required, nor do we intend, to issue a broad statement on the authority or

power of Congress "to control yearly appropriations in an authorizing statute," an issue of apparent concern to the District Court.[16] Nor does this case, as we see it, call into question what the Government refers to as the "well-settled principle that '[a] legislature cannot limit the power of amendment of a subsequent legislature . . .'." Appellees' Brief at 37 (quoting 1A C. SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 22.02, at 107 (4th ed. 1972)). Rather, as explained below, our decision rests upon our interpretation of section 306, H.R. 4389 and the fiscal year 1981 appropriations laws, with particular attention focused on the historical relationship between section 306 and H.R. 4389.

A. *The 1981 Continuing Appropriations Resolutions*

"As in all cases involving statutory construction, 'our starting point must be the language employed by Con-

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[16] Appellants point out, however, that provisions in authorizing legislation have been interpreted to control seemingly conflicting provisions in appropriations laws. In *Pennsylvania v. Weinberger*, 367 F. Supp. 1378 (D.D.C. 1973), the court interpreted the Tydings Amendment to the General Education Provision Act. That amendment stated that "[n]otwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection," unobligated funds from certain appropriations through fiscal year 1973 would remain available through the next fiscal year. 367 F.Supp. at 1383 (quoting 20 U.S.C. § 1225(b) (1970)). The defendants argued that the Tydings Amendment could not be read as extending the applicable appropriations through fiscal year 1974 because, *inter alia*, it would conflict with the continuing appropriations resolution for 1973, which provided funding only through 1973. The court rejected this argument because (1) by its terms the Tydings Amendment operated "notwithstanding any other provision of law" not enacted in specific limitation of the Amendment, and (2) the Tydings Amendment was more specific than the continuing appropriations resolution, which provided funds for several different appropriations acts. 367 F. Supp. at 1385.

gress' ...." *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1537 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Since the fundamental issue in this case is whether the 1981 appropriations laws preclude payment of the claims in dispute, we begin our inquiry by examining the language of the relevant provisions in those laws. Unfortunately, those provisions contain little guidance for decision.

As noted above,[17] the continuing appropriations resolutions for fiscal year 1981 for HHS stated that

> the pertinent project or activity shall be continued ... under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1980, except section 201 of title II of the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriations Act, 1980 (H.R. 4389) as adopted by the House of Representatives on August 2, 1979.

Pub. L. No. 96-536, § 101(a)(4), 94 Stat. 3166 (1980); Pub. L. No. 96-369, § 101(a)(4), 94 Stat. 1351, 1351-52 (1980). It is clear that this provision does not explicitly mention the one-year time limit on filing claims contained in H.R. 4389. Nevertheless, if we disregard the possible effect of section 306, this provision arguably incorporates the conditions of H.R. 4389 (except for section 201, *see* note 9 *supra*), including the one-year time limit.

The parties offer different explanations as to whether and how much of H.R. 4389 was incorporated by the 1981 continuing appropriations resolutions. Appellants contend that the language "under the ... conditions provided in applicable appropriation Acts for the fiscal year 1980" refers to the continuing appropriations resolutions for fiscal year 1980, which, in turn continued the funding of HHS projects according to the provisions of

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[17] *See* text accompanying note 9 *supra*.

H.R. 4389. Thus, they argue that the 1981 appropriations resolutions only incorporated the conditions of H.R. 4389 indirectly, through a "double incorporation by reference." The Government, by contrast, apparently believes that the words "applicable appropriation Acts for the fiscal year 1980" refer directly to H.R. 4389.[18] It argues that the 1981 appropriations resolutions show that Congress clearly intended to incorporate the one-year time limit in H.R. 4389, particularly in light of its decision not to incorporate one provision of H.R. 4389—section 201.[19]

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[18] In its proposed rule and final rule interpreting the 1981 appropriations resolutions, however, *see* Part I.B. *supra*, HHS accepted the "double incorporation" theory. *See* 46 Fed. Reg. 23,273, 23,274 (1981); 46 Fed. Reg. 46,134, 46,135 (1981). The District Court also accepted this theory, concluding that the "1981 appropriations measures, through double incorporation by reference, prohibit the use of HHS appropriations to pay claims filed more than a year after State expenditures." J.A. 23.

[19] *See* note 9 *supra*. The Government argues that Congress' deliberate decision to exclude § 201 indicates that Congress deliberately included every other provision in H.R. 4389, including the one-year time limit on filing prior-period claims. Appellants discount the significance of this exception. They note that the attempt in § 201 to reduce HHS appropriations by reducing fraud and waste was a failure, which even its sponsors had abandoned by the time of the 1981 continuing appropriations resolutions. *See* 126 CONG. REC. H7935 (daily ed. Aug. 27, 1980) (statement of Rep. Michel). Thus, appellants contend that Congress' decision not to continue the effect of § 201 does not indicate a specific congressional intent to preserve every other provision of H.R. 4389. The legislative history of the decision to exclude § 201 from the 1981 appropriations resolutions cited by the Government does not clearly show anything more than an interest in not prolonging § 201. We therefore conclude that the exclusion of § 201 does not evidence a clear intent to preserve the one-year time limit of H.R. 4389 *and* to override the time limits in § 306, nor does it adequately meet the requirement of § 306(c).

We need not determine whether the 1981 appropriations laws directly or indirectly incorporated the provisions of H.R. 4389 or whether Congress explicitly intended to incorporate the one-year time limit from that bill. Despite their apparent disagreement on these questions, the parties acknowledge that the language of the 1981 appropriations resolutions alone is inadequate to support their ultimate positions in this case. Appellants do not contend that the incorporation of the conditions in H.R. 4389 is so ambiguous or indirect that, even without taking into account the effect of section 306(c), the one-year time limit from H.R. 4389 was not effectively incorporated. Rather, their argument hinges on their interpretation of section 306(c). Similarly, the Government does not argue that, even if section 306(c) applies to and governs the interpretation of the appropriations resolutions, the incorporation of the one-year time limit in H.R. 4389 is so explicit that it overrides section 306. Rather, the Government's argument is that section 306(c) simply has no bearing on the appropriations resolutions. In short, the parties appear to agree that *in the absence of section 306* the 1981 appropriations laws would incorporate the one-year time limit in H.R. 4389; the arguments of the parties in this case thus hinge on their construction of section 306.[20]

B. *Section 306: The Government's Distinction Between Appropriations Laws and Substantive Legislation*

1. *Language of Section 306*

The language of section 306 provides little support for the Government's contention that that law establishes substantive time limits on the filing of claims but

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[20] The parties have pointed us to nothing in the legislative history of the 1981 continuing appropriations resolutions discussing or referring to either the time limit in H.R. 4389 or § 306.

has nothing to do with similar time limits in appropriations laws. Of course, section 306 is not an appropriations law and does not itself appropriate funds. Nevertheless, the language of that law does not suggest a rigid distinction between the filing and the payment of state claims; nor does it suggest that time limits imposed in appropriations laws might be entirely different from the time limits in section 306. For example, section 306(b)(2) provides that, for claims filed before the date of enactment of section 306 for reimbursement of pre-October 1, 1979 expenditures, "there shall be *no time limit* for the *payment* of such claims." *See* note 6 *supra*. Similarly, section 306(b)(3), which appellants claim establishes the time limit for filing the prior-period claims in dispute here, states that for pre-October 1, 1979 expenditures for which no claim has been filed by the date of enactment, "*payment* shall not be made under this Act on account of any such expenditure unless claim therefor is filed . . . prior to January 1, 1981." *See* note 7 *supra*.

Appellants rely most heavily on the language of section 306(c) to show that the time limits in section 306 were intended to control over any other *conflicting time limits*, including those contained in appropriations laws. The Government, on the other hand, contends that section 306(c) itself was not intended to apply to appropriations provisions. The language of section 306(c), however, plainly contradicts the Government's assertion:

> Notwithstanding *any other provision of law*, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically exempts such filing or payment from the provisions of this section.

Pub. L. No. 96-272, § 306(c), 94 Stat. 500, 531 (1980) (emphasis added). This language does not support a dis-

tinction between appropriations laws and substantive laws; nor does it in any way indicate that section 306(c) was not intended to apply to time limit provisions found in appropriations rather than in so-called substantive legislation.

Furthermore, the claim by the Government that the substantive provisions of section 306 should not be read so as to limit Congress' appropriations authority is a red herring. Nothing in section 306—even under appellants' construction of that section—affects congressional authority to appropriate funds. In this case, for example, Congress could have adopted 1981 appropriations resolutions that provided no funds whatsoever for the programs here at issue. If this had been done, nothing in section 306 could have been read to require payments where no funds were appropriated. However, as it happened, Congress did appropriate funds sufficient to pay appellants' claims in fiscal year 1981; the sole issue in this case is whether the claims were timely filed.

2. *Legislative History of Section 306*

Because it can find no support in the statutory language of section 306(c), the Government relies on the legislative history of that section to support its position. The Supreme Court has warned, however, that "[g]oing behind the plain language of a statute in search of a possibly contrary Congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1540 (1982) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)). Indeed, "[a]bsent a clearly expressed legislative intention to the contrary, [the] language [of the statute] must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). With these standards in mind, we review the legislative history of section 306.

Congress enacted section 306 as part of the Adoption Assistance and Child Welfare Act of 1980. H.R. 4389 was still pending at the time Congress was considering H.R. 3434, the bill that ultimately became that Act. Although the legislative history of section 306 is sparse, it is clear that Congress had the one-year time limit in H.R. 4389 in mind when it enacted section 306. Indeed, both sides in this case agree that the decision to include section 306 in the Act was a direct response to the one-year time limit contained in H.R. 4389.

In a September, 1979 subcommittee hearing on H.R. 3434, Senator Moynihan made it clear that he disapproved of the time limit provision in H.R. 4389 and that he intended to add a provision to H.R. 3434 to overrule it. During that hearing, Barbara Blum, the New York State Commissioner of Social Services, testified about the potential problems the time limit in H.R. 4389 might cause, and Senator Moynihan expressed his intent to counteract that provision.

> Senator MOYNIHAN. ... Are you aware of the provisions of the fiscal 1980 Labor/HEW appropriation conference report currently pending before the Senate which prohibit Federal reimbursement for State and local expenditures for AFDC, title XX, and medicaid programs which are more than a year old? Answer "yes" or "no."
>
> MS. BLUM. Yes, sir, I am.
>
> Senator MOYNIHAN. And do you think this is a good idea?
>
> MS. BLUM. No, sir, it is very detrimental.
>
> ....
>
> Senator MOYNIHAN. We are going to try to amend it but let me ask you seriously—we are thinking of putting in, starting around fiscal year 1982, a 2-year limit so you would know that you have 2 years and you better get it done in 2 years. But right now you are just being given no notice at all.

Hearing on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance, 96th Cong., 1st Sess. 124 (1979) ("*Hearing on H.R. 3434*").

The Finance Committee staff prepared a memorandum explaining Senator Moynihan's suggested solution to this problem. The memorandum makes it clear that his proposed amendment to the Social Security Act was designed to be a permanent alternative to the method of including a time limit in yearly appropriations bills such as H.R. 4389. It states:

> Th[e] limitation [in H.R. 4389] would apply only in the case of appropriations in this particular appropriation bill, and it would limit the filing of retroactive claims against these appropriations to between one and two years.
>
> *Senator Moynihan has suggested that another approach be adopted instead* under which the Social Security Act would be amended effective October 1, 1981 to limit the period of retoractivity [sic] for State claims to a full two years under the various titles of the Act. *Such a provision would be a feature of permanent law (rather than in an annual appropriation bill)*, and would allow States a reasonable time for filing of claims.

Hearing on H.R. 3434, at 2 (emphasis added).

At the time the Senate Finance Committee was considering this proposal, the House had already included in its version of H.R. 3434 a limited one-year time limit on filing claims for expenditures under the Child-Welfare Services program, Title IV, Part B of the Social Security Act, 42 U.S.C. §§ 620-628 (1976 & Supp. IV 1980). *See* H.R. REP. No. 136, 96th Cong., 1st Sess. 78 (1979). The Senate Finance Committee added the more general two-year time limit, applicable to most of the major social security programs, that ultimately became section 306(a) of the Act. *See* S. REP. No. 336, 96th Cong., 1st Sess. 96, 132 (1979). The Committee explained in its Report that it did not intend the time lim-

it to apply retroactively to limit payment for past expenditures. *See id.* at 96.[21]

Despite this interpretation in the Senate Report, several Senators remained concerned about the possible retroactive application of the time limit. When the Senate considered H.R. 3434 on October 25, 1979, they offered a floor amendment designed "to provide a transition period to the provision in the Senate Finance Committee bill." 125 CONG. REC. S15,128 (daily ed. Oct. 25, 1979) (statement of Sen. Moynihan). The amendment they offered was enacted and now constitutes section 306(b) and section 306(c) of the Act. Senator Moynihan explained:

> So this amendment, which Senator JAVITS and I, Senator BELLMON, and Senator TSONGAS and others have introduced, does one simple thing: It says that for claims already filed with HEW— already filed—there is no time limit on HEW's paying them; second, that expenditures made by States up through fiscal 1979 may be claimed as late as January 1, 1981; and, finally, no other limitations shall be valid.

125 CONG. REC. at S15,128.

The ensuing floor debate on the amendment underscored the fact that section 306 was designed to be a permanent solution to the problem of delayed claims, and to replace the alternative approach of dealing with the problem in appropriations bills. Senator Magnuson,

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[21] The Report stated:

> While this provision establishes a time limitation on claiming reimbursement for expenditures for fiscal year 1980 and subsequent years, in the view of the committee it does not authorize any change in the treatment of outstanding expenditures for earlier years. The expenditures for such earlier years retain their status as entitlement items for which the Federal Government is obligated by statute to provide appropriate matching.

S. REP. No. 336, 96th Cong., 1st Sess. 96 (1979).

the chairman of the Senate Appropriations Committee, stated that "[w]e in the HEW appropriations have been trying to speed up the claims," and expressed the hope that the amendment would not be an "indication for any more stalling by the States in sending in their claims so that we can dispose of them." 125 CONG. REC. at S15,128. Although Senator Magnuson regarded the floor amendment as "a reasonable amendment for a transition period," he reiterated that "we are going to insist that we get back to a 2-year limitation," *id.*, perhaps suggesting that he would take action in the appropriations arena. Senator Moynihan responded immediately to his statement:

> Mr. MOYNIHAN. Mr. President, will the Senator permit me to speak? The bill before us establishes the 2-year limitation.
> Mr. MAGNUSON. Yes
> Mr. MOYNIHAN. In the law.
> Mr. MAGNUSON. OK.

Id.

Senator Javits offered a detailed explanation of the floor amendment. His statement indicates that this amendment, like the provision already added to H.R. 3434 by the Finance Committee, was intended to overrule the time limit in the still-pending H.R. 4389. The Government's argument that section 306(c) was not intended to affect limitations in future appropriations laws relies heavily—indeed, almost entirely—on Senator Javits' explanation. We therefore review his comments in detail.

Senator Javits indicated that the two-year time limit in H.R. 3434 was intended to be a permanent alternative to the limiting provision in H.R. 4389. Referring to that provision in H.R. 4389, Senator Javits stated:

> It is my understanding that the Appropriations Committee took this action to force States to file more timely claims so that expenditures under the entitlement programs would be more predictable.

> While I am in complete agreement with the Appropriations Committee that the process for filing claims should be improved, I am not in agreement with the solution developed by the Appropriations Committee.
>
> H.R. 3434 contains a provision which offers a prospective solution to this problem....

125 CONG. REC. at S15,128. There can be no question, in light of this language, that Senator Javits believed that the amendment to the Social Security Act contained in H.R. 3434 was intended to be an alternative approach that would control over the provision in H.R. 4389.

Senator Javits went on to explain that, since the provision in H.R. 3434 was a "prospective solution," paragraph (b) of the floor amendment (corresponding to section 306(b)), was necessary to deal with the problem of past expenditures. He stated that, under that provision, any claim currently pending before HEW could be paid if otherwise allowable, regardless of how old the claim was. For any expenditure made before October 1, 1979 for which a claim had not yet been filed, the amendment required that a claim be filed by January 1, 1981. 125 CONG. REC. at S15,128.

Finally, Senator Javits explained the purpose of paragraph (c) of the amendment, which ultimately became section 306(c). It is from this statement that the Government derives its distinction between substantive laws and appropriation measures.

> Paragraph (c) of the amendment stipulates that no other provision of law may alter the policy established in H.R. 3434 with respect to the filing or payment of medicaid, welfare or social services claims unless such other provision of law specifically exempts such filing or payment from the provisions of this section. This paragraph is designed to address a concern which might arise if the fiscal year 1980 Labor/HEW appropriations bill [H.R.

> 4389] is enacted after H.R. 3434 given the general rule that the policy of the most recently enacted bill prevails. I would like to stress that the reason for including this provision is to clarify the intent of Congress should this unusual circumstance occur; consequently, I would recommend to the Finance Committee that this particular paragraph be dropped in the conference on H.R. 3434 if the fiscal year 1980 Labor/HEW appropriations bill is enacted first.

125 CONG. REC. at S15,128. Based on this statement, the Government argues that the sole reason for section 306(c) was to protect against the possibility that H.R. 4389 would be found to have impliedly repealed the *substantive policy* on claims filing embodied in H.R. 3434. It further contends that section 306(c) was not intended to limit Congress' future appropriations authority or to affect the interpretation of any appropriations measure. The final step in the Government's reasoning is that section 306(c) thus has no bearing on the one-year time limit incorporated in the 1981 continuing appropriations resolutions, even though it is the very same limit contained in H.R. 4389.

The Government's argument cannot withstand careful analysis. First, as noted before, it flies in the face of the actual language of section 306(c) enacted by Congress, which by its terms applies to *any law* that establishes any time limit on the filing or *payment* of claims. Second, it is inconsistent with other congressional statements concerning section 306(c), such as Senator Moynihan's summary of the floor amendment, in which he stated that under the amendment "no other limitations shall be valid." 125 CONG. REC. at S15,128. Similarly, during the Senate debate on the Conference Report on H.R. 3434,[22] after the amendment had been

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[22] The Conference Report itself merely explains in simple form the provisions of § 306, without even mentioning § 306(c). *See* H.R. REP. No. 900, 96th Cong., 2d Sess. 66-67 (1980).

passed by the Senate and accepted by the House conferees, Senator Moynihan stated that the bill

> regularizes the procedures and timetables under which States file with the Department of Health and Human Services their claims for federal matching under the several titles of the Social Security Act and makes clear that these are entitlement programs, under which all valid claims must be honored by the Federal Government *so long as they are filed within the time periods specified in the Social Security Act itself.*

126 CONG. REC. S6940 (daily ed. June 13, 1980) (emphasis added).

Finally, the Government's argument badly strains the very language of Senator Javits upon which it is based. Senator Javits drew no distinction between substantive laws and appropriations laws. That he used the word "policy" certainly does not connote so sweeping a distinction, despite the Government's attempt to impute broad significance to that word choice. *See* Appellees' Brief at 47-48. Nor does his suggestion that paragraph (c) be deleted if H.R. 4389 were enacted before H.R. 3434 bolster the Government's position. The Government concludes from this suggestion that Senator Javits intended section 306(c) to affect only the time limit in H.R. 4389, rather than possible time limits in future bills as well. But at that time, H.R. 4389 was the one bill containing a conflicting time limit, the time limit at which section 306 was in fact directed. Moreover, as noted above, it seems clear from the legislative history that section 306 was intended to be a permanent alternative to placing time limits in yearly appropriations bills. Accordingly, it is not surprising that Senator Javits did not focus on the possibility that Congress would continue to place time limits in appropriations bills, let alone revive the very limit in H.R. 4389.[23]

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[23] One could also argue that the scenario that formed the basis of Senator Javits' concerns in fact took place: H.R. 4389 was,

Lastly, regardless of Senator Javits' suggestion, Congress did enact section 306(c) and it remains in force today.[24] Senator Javits' statements simply cannot bear the weight of the theory the Goverment places on them. Certainly his words do not constitute a clear congressional intent sufficient to override the plain meaning of the language of section 306(c).

Most importantly, the Government's argument loses sight of what is most apparent from the legislative history of section 306: Congress did not want the time limit in H.R. 4389 to control. Indeed, Senator Javits' statements, which reflect his disagreement with the "solution" in H.R. 4389 and his belief that section 306 would replace it, make this clear. Even his statement about deleting section 306(c) if H.R. 4389 were enacted first supports this view: deleting the provision would have been appropriate, in Senator Javits' opinion, because if H.R. 4389 were enacted before section 306, it would be clear that section 306 controlled. The Government's argument that is focused on a claim of so-called "prospective nullification" is thus plainly specious. The important point is that, as the legislative history shows,

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in a sense, enacted after § 306 when it was incorporated by reference in the 1981 appropriations laws. The Senator intended § 306(c) to make clear that, in such an event, the limits in § 306, rather than those in H.R. 4389, would control.

[24] The Adoption Assistance and Child Welfare Act of 1980, of which § 306 was a part, was passed in final form by the House and the Senate on June 13, 1980, 126 CONG. REC. H4984 (House agreed to Conference Report), S6945 (Senate agreed to Conference Report) (daily ed. June 13, 1980), and signed by the President on June 17, 1980. The conflict over H.R. 4389 had hardened by that time. On September 24, 1979, the Senate considered the conference report on H.R. 4389, but refused to accept the House amendment dealing with federal funding of abortions. 125 CONG. REC. S13,253-56 (daily ed. Sept. 24, 1979). The Houses were unable to reconcile their differences over that provision, and in October 1979 Congress passed the first continuing appropriations resolution for 1980.

section 306 *was* intended to nullify the time limit in H.R. 4389 itself, which is the very time limit that the Government maintains is preserved in the 1981 appropriations laws.

C. *The Nature of the Time Limit in H.R. 4389 as Allegedly Incorporated in the 1981 Appropriations Laws*

The Government's argument in this case really depends on two propositions: The first proposition is that section 306 does not apply to or affect the interpretation of provisions in appropriations resolutions. We have already rejected this as inconsistent with the language and legislative history of section 306. The second, correlative proposition is that, as allegedly incorporated in the 1981 appropriations laws, the one-year time limit in H.R. 4389 is merely an appropriations provision that restricts available funds but does not conflict with the time limits in section 306. We now turn briefly to this contention.

We reject the suggestion that there is a clear demarcation between so-called substantive provisions and appropriations provisions where, as in the context of this case, both establish time limits on the filing and payment of state claims for federal matching funds. Assuming, however, that the distinction is as clear as the Government seems to contend, we are not convinced that the restriction in the 1981 appropriations laws falls on the "appropriations" side of the line.

Historically, Congress has dealt with the substantive policy problem of prolonged delay in the filing of reimbursement claims by inserting restrictive provisions in appropriations bills. For example, in a fiscal year 1979 appropriations bill, H.R. 12929, 95th Cong., 2d Sess. (1978), the Senate Appropriations Committee included a provision imposing a ninety-day time limit on the filing of claims for pre-1977 Medicaid expenditures. *See* S. REP. NO. 1119, 95th Cong., 2d Sess. 83 (1978). While the conference committee deleted the provision, the ex-

planation it offered indicates that it was concerned not merely with reducing HHS appropriations, but with forcing the states to file more timely claims.

> Although the conferees have decided against a fixed time limitation for submitting welfare claims at this time, the Appropriations Committees are concerned about the difficulty of estimating current funding requirements for medicaid, assistance payments and social services programs if States can be reimbursed out of current appropriations for claims that occurred in previous years. While not wishing to penalize States that have legitimate reasons for submittal of late claims, the conferees believe that the Federal, State, and local agencies in the public assistance programs must keep their accounting records up to date and eliminate such retroactive funding practices.

H.R. REP. No. 1746, 95th Cong., 2d Sess. 17 (1978) (Conference Report).

Congress viewed the time limit in H.R. 4389 as addressing the same concerns. During the debate on the section 306 amendments, Senator Javits stated in reference to the restrictive provision in H.R. 4389: "It is my understanding that the Appropriations Committee took this action to force States to file more timely claims so that expenditures under the entitlement programs would be more predictable." 125 CONG. REC. S15,128 (daily ed. Oct. 25, 1979).[25] Indeed, the Government's argument concerning the purpose of section 306(c) is

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[25] The report of the hearings on H.R. 3434, held by the Subcommittee on Public Assistance of the Senate Finance Committee, contain a memorandum entitled "Information Sheet on H.R. 4389." This memorandum, apparently submitted to the committee by Commissioner Blum of New York to persuade the Senators to overrule the time limit in H.R. 4389, *see* Part II.B.2. *supra*, also indicates that that time limit originated as an effort to alleviate the problem of delayed claims filing. *See Hearing on H.R. 3434*, at 126.

based on the premise that Congress passed that section because it feared the limiting provision in H.R. 4389 would implictly repeal, as a matter of *substantive law*, the time limit *policy* in section 306.

Nevertheless, the Government contends that the very same provision of H.R. 4389, which it believes Congress explicitly and purposely incorporated in the 1981 appropriations laws, was somehow transformed into a "mere" appropriations restriction in that context. In discussing the history of section 306(c), the Government states that the limiting provision in H.R. 4389, coupled with the explanation in the conference report,[26] "could have been interpreted as an indication that the restriction in H.R. 4389 was intended to establish substantive *policy* for the filing and payment of claims under the Social Secuirty [sic] Act, and not merely to restrict the use of fiscal year 1980 funds." Appellees' Brief at 41 (emphasis in original). In discussing the same provision of H.R. 4389 as allegedly incorporated in the 1981 appropriations laws, however, the Government concludes that it "is a classic appropriations restriction," rather than substantive legislation. *Id.* at 51.[27]

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[26] The conference report explained that the provision in H.R. 4389 barring payment of claims for pre-September 30, 1978 expenditures was actually intended to impose a one-year time limit on the filing of those claims. H.R. REP. NO. 400, 96th Cong., 1st Sess. 18 (1979). *See* Part I.A. *supra*.

[27] Remarkably, the Government also insists that the 1981 appropriations laws do not impose a time limit derived from H.R. 4389 at all. In summarizing the purpose of § 306(c), the Government states that "[b]y stipulating in section 306(c) that the time limitation policy in section 306 of H.R. 3434 would govern unless 'specifically' superseded by some other law, Senator Moynihan and his colleagues provided protection to section 306 against an implied repeal by subsequent enactment of H.R. 4389 . . . ." Appellees' Brief at 42. Based on that premise, the Government then makes the following circular leap: "Since the restriction in

The basis for this transformation is not apparent. It surely cannot be that the limiting provision in H.R. 4389 meant one thing when it was spelled out in that bill and another when it was allegedly incorporated by reference in the 1981 appropriations resolutions. No explanation is offered for these glaring inconsistencies in the Government's arguments, in all likelihood because none is available. The suggested distinctions between *substantive* and *appropriations* provisions simply make no sense in the context of this case. If Congress had intended in fiscal year 1981 to deny or limit funds available for prior-period claims—to some amount *below* what had been available during the preceding year—it had at least two clear options: (1) limit the amount of the appropriation to HHS for fiscal year 1981 for the programs in question or (2) adopt time limits that were more rigid than those contained in section 306, employing the express exemption required by section 306(c). The latter method, *i.e.*, implementation of more rigid time limits on prior-period claims, is an indirect means of controlling HHS expenditures. Had it been employed in 1981, as it was in the continuing appropria-

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House-passed H.R. 4389, incorporated in the fiscal year 1981 appropriations laws for HHS, does not 'specifically' supersede section 306, the Government has *not* sought 'to apply a time limit for past-period claims derived from H.R. 4389' (Brief for the Nine Appellant States, p. 22)." *Id.* Clearly this conclusion is at odds with the Government's contention that the 1981 appropriations laws explicitly incorporated the one-year time limit in H.R. 4389. It is also inconsistent with the Government's position that § 306(c) cannot be used to construe the meaning of those appropriations laws. Congress' failure to exempt the one-year time limit from the provisions of § 306 cannot reasonably be interpreted to support the conclusion the Government draws from it.

tions resolutions for fiscal year 1982,[28] there would be no question about the validity of the limit.

In short, we hold that even if the 1981 continuing appropriations resolutions can be read to incorporate the time limits from H.R. 4389, the incorporation was ineffective because it did not comply with section 306(c). The requirements of section 306(c) could not be ignored simply because—as the Government contends—the new time limits for 1981 were a part of appropriations resolutions as opposed to substantive law. The suggested distinction is one without meaning in the context of this case.

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[28] The fiscal year 1982 appropriations act for HHS, H.R. 4560, 97th Cong., 1st Sess. (1981), contained a provision stating:

> Notwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act, no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred.

Id. § 207. The bill passed the House, 127 CONG. REC. H7097 (daily ed. Oct. 6, 1981), and was reported to the full Senate on November 9, 1981. 127 CONG. REC. S13,145 (daily ed. Nov. 9, 1981). As such, the provisions of the bill were incorporated into the second continuing appropriations resolution for fiscal year 1982. Act of Dec. 15, 1981, Pub. L. No. 97-92, § 101(a) (1)-(3), 95 Stat. 1183 (1981).

Congress' incorporation of this provision in fiscal year 1982 could bear on the interpretation of the 1981 appropriations laws in several ways. On the one hand, it could be viewed as an indication that Congress did intend to incorporate the one-year time limit in the 1981 laws and simply neglected to do so explicitly. On the other hand, it could be viewed as a congressional acknowledgement that, to effectively incorporate such a time limit, it is necessary to exempt it from § 306, something it failed to do in the 1981 laws. In any event, neither side in this case relies on the 1982 appropriations provision to support its construction of the 1981 laws.

D. *Concluding Remarks*

As we noted at the beginning of our analysis, our decision is a narrow one. We are concerned only with the fiscal year 1981 appropriations laws. Those laws incorporated, without comment or explanation, virtually all of the provisions of H.R. 4389, including the one-year time limit on the filing of certain prior-period claims. In enacting section 306, however, Congress expressed its disagreement with that time limit and its belief that the permanent solution to the problem of delayed claims embodied in section 306 should control over H.R. 4389. The words of section 306(c) plainly state that no other limits on the filing or payment of claims shall control unless they are specifically exempted from section 306. And, whatever ambiguity there may be in the legislative history about the reach of section 306(c), there is no question that it was intended to ensure that the time limits in section 306 would control over the conflicting provision in H.R. 4389. We would have to disregard the language of, and the intent behind, section 306 to reach the result urged by the Government and accepted by the District Court. The Government has provided us no sound reasons for doing so.

We have considered the Government's argument that, despite the plain words of section 306(c), that provision was intended to apply to the time limit in H.R. 4389 as a provision of substantive law in 1980, but not as an appropriations provision in 1981. To follow the Government's approach would lead us down a path fraught with hazards. The Supreme Court has only recently warned that "[s]tatutes should be interpreted to avoid untenable distinctions ... whenever possible." *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1538 (1982); *see id.* at 1539 n.6. That is what we do today. We need not determine how section 306(c) would affect our decision if a different appropriations provi-

sion were before us. Nor do we need to decide, as a general matter, the extent to which Congress can control or limit appropriations authority in an authorizing statute. Resolution of those questions must await another day.

III. Availability of Injunctive Relief

When this suit was filed, appellants sought preliminary injunctive relief to prevent the remaining fiscal year 1981 funds appropriated to HHS from reverting to the general Treasury under 31 U.S.C. § 701(a)(2) (1976). *See* note 15 *supra*.[29] The District Court refused to grant the requested preliminary relief, dismissing the suit instead. In light of the reversion of the remaining 1981 HHS appropriations, the Government now argues that appellants are no longer eligible for injunctive relief, even if we decide that the 1981 appropriations laws did not preclude payment of the disputed claims and that HHS therefore unlawfully refused to process those claims. We do not agree.

This court has repeatedly "reaffirmed the power of the courts to order that funds be held available beyond their statutory lapse date if equity so requires." *National Association of Regional Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977); *accord*, *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 55-57 (D.C. Cir. 1977); *City of Los Angeles v. Adams*, 556 F.2d 40, 51 (D.C. Cir. 1977); *National Association of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321,

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[29] Appellants do not question whether the balance of the 1981 HHS appropriations reverted by operation of 31 U.S.C. § 701(a)(2). We note, however, that under 31 U.S.C. § 665b (1976), "[a]ny provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds." *But see* 119 Cong. Rec. 22,326 (1973) (statement of Sen. Chiles) (indicating that this provision was intended to be limited in scope).

338-39 (D.C. Cir. 1976). We have made it clear that the power to prevent the statutory lapse or reversion of an agency's budget authority[30] does not conflict with Congress' exclusive power to appropriate funds.

> Decisions that a court may act to prevent the expiration of budget authority which has not terminated at the time suit is filed are completely consistent with the accepted principle that the equity powers of the courts allow them to take action to preserve the status quo of a dispute and to protect their ability to decide a case properly before them. In such situations, the courts simply suspend the operation of a lapse provision and extend the term of already existing budget authority.

National Associations of Regional Councils, 564 F.2d at 588; *accord*, *Jacksonville*, 556 F.2d at 55; *Grueschow v. Harris*, 492 F. Supp. 419, 422 (D.S.D.), *aff'd*, 633 F.2d 1264 (8th Cir. 1980). Under the controlling case law, the critical question is whether the budget authority has already lapsed before suit has been filed. As the court in *National Association of Regional Councils* stated, "If . . . budget authority has lapsed before suit is brought, there is no underlying congressional authorization for the court to preserve." *Id.* at 588-89;[31] *accord*, *Township of River Vale v. Harris*, 444 F. Supp. 90, 93-94 (D.D.C. 1978). Since appellants filed this suit and requested preliminary relief before the remaining 1981 funds lapsed, the District Court clearly had equi-

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[30] The term "budget authority" is a general term describing an agency's authority, granted by Congress, to enter financial obligations. It encompasses appropriations, contract authority and borrowing authority. *See National Ass'n of Regional Councils*, 564 F.2d at 586.

[31] Distinguishing other cases in which suit had been filed before the relevant budget authority lapsed, the court in *National Association of Regional Councils* concluded that it had no authority to order obligation of budget authority that had lapsed before suit was filed. 564 F.2d at 583-90.

table authority to suspend operation of the statutory lapse provision.

As we concluded in Part II *supra*, the District Court's decision to dismiss appellants' suit and not to grant them the requested relief was based on an erroneous interpretation of the relevant statutes. Ordinarily, it is within the broad remedial authority of an appellate court to reverse an erroneous decision of a lower court and to order that appropriate relief be awarded. *See* 28 U.S.C. § 2106 (1976).[32] In *Jacksonville Port Authority v. Adams*, 556 F.2d 52 (D.C. Cir. 1977), this court recognized its continuing authority to order injunctive relief in circumstances similar to those in this case. In *Jacksonville*, the plaintiff port authority sued to secure funds allocated to it by statute. The plaintiff requested a temporary restraining order shortly before the cutoff date of the authority of the agency involved to obligate the funds sought by plaintiff. The District Court denied the requested preliminary relief, and the cutoff date passed.[33] Nevertheless, the court of appeals held that the case was not moot, and that it had the authority under 28 U.S.C. § 2106 to "provi[de] the relief even at this late date that would have been available on the merits from the [District] [C]ourt if it had done what should have been done and provided a preservation remedy." 556 F.2d at 57.

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[32] 28 U.S.C. § 2106 (1976) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, degree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[33] This District Court dismissed the complaint for injunctive relief as moot after the cutoff date had passed. *See* 556 F.2d at 54-55.

Despite this holding, the Government relies on the reasoning of the court in *Jacksonville* to support its argument that injunctive relief is no longer available to appellants in this case. The argument is based upon two comments made by the court in *Jacksonville* in discussing whether injunctive relief was still available. First, the court stated: "In appraising the equity and justice of ordering a grant under lapsed authority, it is material to consider whether Congress has turned its back on the program as contrary to sound policy." 556 F.2d at 56. Second, the court "noted that Jacksonville did not sleep on its rights in making application or bringing suit." *Id.* at 57. The Government construes these remarks as a rigid, "two-part test" for determining whether relief is still available, *see* Appellees' Brief at 62, even though it appears from the opinion in *Jacksonville* that these were simply factors that the court considered in determining whether to exercise its equitable authority. In any event, we do not believe either of those factors bars injunctive relief in this case.

The Government argues that appellants were not diligent "either in bringing suit or in preserving their rights on appeal." Appellees' Brief at 64. We disagree. Appellants could not have been expected to file suit earlier than they did because HHS had not yet issued a final rule barring payment of the disputed claims. As it was, appellants filed suit two days before the final rule was published. Had they done so earlier, their suit would probably have been dismissed as premature, on the ground that HHS could still provide complete relief in a final rule. The Government also argues that appellants' failure to seek a stay pending appeal precludes injunctive relief at this point. The District Court, however, issued its decision on September 30, 1981, the last day of the fiscal year, when the funds were to revert to the general Treasury. Appellants would have had to file an emergency motion for an injunction, which this court

would have had to consider and grant, within hours of the District Court decision. Their failure to do so hardly constitutes "sleeping on their rights." The court in *Jacksonville* in fact concluded that the failure of the appellant in that case to immediately appeal the denial of the requested temporary restraining order did not constitute a lack of diligence.[34] In reaching this conclusion, it stated: "[W]e do not think it sound to impose a burden of frantic exhaustion of appellate remedy at the last moment." 556 F.2d at 57 (footnote omitted). Imposing such a burden would be equally unwise in the circumstances of this case.[35]

Finally, the Government argues that, by incorporating the one-year time limit in the continuing appropriations resolution for fiscal year 1982, *see* note 28 *supra*, Congress "has turned its back on the program as contrary to sound policy." *Jacksonville*, 556 F.2d at 56. As appellants point out, however, Congress clearly has not turned its back on providing State grants for the social security programs in question as contrary to sound policy. In addition, appellants do not seek payment of their claims from fiscal year 1982 funds, and neither side has argued that Congress' action in the 1982 appropriations laws has any bearing on whether Congress precluded payment of those claims from the fiscal year 1981 appropriations. We have already decided that Congress did *not* preclude payment of the claims from 1981 funds. To decide that Congress' express inclusion of the one-year time limit in the 1982 appropriations laws should preclude injunctive relief concerning 1981 appro-

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[34] The court did not decide whether Jacksonville could have appealed the denial of the temporary restraining order under 28 U.S.C. § 1292(a)(1) (1976). 556 F.2d at 57.

[35] Indeed, imposing such a burden would be more inappropriate and inequitable in this case because HHS, in effect, controlled the timing of the suit by controlling the time of its final rulemaking.

priations would, in practical effect, change our decision on the merits.[36]

Moreover, concluding that appellants are no longer eligible for injunctive relief would lead to a highly unjust result. It would mean that, because of the timing of HHS's rulemaking, an unlawful decision by HHS not to process appellants' claims, an erroneous District Court decision, and the passage of less than one day's time, appellants are no longer entitled to meaningful relief. "Our authority under 28 U.S.C. § 2106 to fashion an appellate remedy in the interest of justice," *Jacksonville*, 556 F.2d at 57, permits us to avoid such an outcome. We therefore reject the Government's argument that appellants are no longer eligible for injunctive relief.

Having decided that the appellants are entitled to injunctive relief, we point out that the scope of that relief is limited to the amount of fiscal year 1981 funds which remain available. Indeed, at oral argument, counsel for the nine states conceded that it is undisputed that the claims in issue may only be satisfied out of whatever balance remains. While our decision is to be taken as establishing a presumption that these funds are available, this question is not fully resolved. During oral argument, counsel for the Government suggested that funds could not be reached, but was unwilling to state unequivocally that any relief the court might grant would be futile. Accordingly, we remand to the District Court for the purpose of determining whether funds are available to satisfy the claims and, if so, the extent of that balance.

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[36] We also reject the Government's argument that the words "any other appropriation" that were incorporated into Pub. L. No. 97-92, *see* note 28 *supra*, have the effect of barring payment of the disputed claims from 1981 as well as 1982 appropriations. *See* Appellees' Brief at 66.

IV. CONCLUSION

For the reasons set forth above in Part II, we conclude that the appropriations laws for fiscal year 1981 did not bar payment of the prior-period claims in dispute. We further conclude that appellants are entitled to injunctive relief, as discussed in Part III. We therefore reverse the District Court's decision and remand so that the District Court may fashion appropriate relief.

So Ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1981

CA 81-2237

No. 81-2090

STATE OF CONNECTICUT, ET AL., AND
STATE OF CALIFORNIA, PLAINTIFF-INTERVENOR,
APPELLANTS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: EDWARDS and BORK, *Circuit Judges*, and BONSAL, * *Senior District Judge* for the Southern District of New York

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

appealed from in this cause is hereby reversed, and the case is remanded for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
Clerk

Date: JULY 27, 1982

Opinion for the Court filed by Circuit Judge Edwards.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1982

CA 81-02237
No. 81-2090

STATE OF CONNECTICUT, ET AL., AND
STATE OF CALIFORNIA, PLAINTIFF-INTERVENOR,
APPELLANTS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.

FILED SEP 22 1982

Before: EDWARDS and BORK, *Circuit Judges* and BONSAL *, *Senior District Judge* for the Southern District of New York

ORDER

On consideration of appellees' petition for rehearing, filed September 10, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
For the Court:

By: ROBERT A. BONNER
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1982

CA 81-02237
No. 81-2090

STATE OF CONNECTICUT, ET AL., AND
STATE OF CALIFORNIA, PLAINTIFF-INTERVENOR,
APPELLANTS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.

FILED SEP 22 1982

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, MACKINNON, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK and SCALIA, *Circuit Judges*

ORDER

Appellees' suggestion for rehearing *en banc* has circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For the Court:

By: ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 81-2237
Filed: September 30, 1981

STATE OF CONNECTICUT, ET AL., PLAINTIFFS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

MEMORANDUM OPINION

This case presents the question of whether a section of the statute authorizing programs under the Social Security Act was intended to control or restrict yearly appropriations for those programs. The issue presented is a narrow one of statutory interpretation and for the reasons stated herein, the Court finds that the authorizing statute was not intended to control appropriations for authorized programs.

Ten states of the United States are Plaintiffs in this action seeking declaratory and injunctive relief against the Department of Health and Human Services (HHS) and its Secretary for their refusal to pay State claims for reimbursement of expenditures incurred prior to September 30, 1978 for various programs under the Social Security Act. Defendants have refused to pay those claims because they were filed more than a year after the expenditures, citing the fiscal year (FY) 1981 appropriations resolutions which restrict payment of such claims. Plaintiff argue that the appropriations restriction is invalid since it did nothing to change the more

liberal period for filing claims provided in substantive provisions of the Act (and a regulation thereunder) which, Plaintiffs aver, control the payment of claims.

This case originally came before the Court with Plaintiffs' Motion for a Temporary Restraining Order to Compel Defendants to set aside FY 1981 appropriations for payment of the claims at issue. At the hearing held September 28, 1981, all parties agreed to consolidation of the hearing on the merits with the application for preliminary relief.

I. Statutory Background

There are only two statutory provisions involved in this litigation. Their relationship to each other is fundamental to resolving the instant dispute.

A. *The Social Security Act Amendment*

States receive grants from HHS for public assistance programs they administer in cooperation with the Federal government under certain titles of the Social Security Act, 42 U.S.C. § 301, *et seq.* (Supp. III 1979). HHS advances grants to the States and the States are allowed to submit claims for reimbursement of funds expended by them to which they are entitled under the Act. Until 1980, there were no time limits for filing reimbursement claims. Congress set out to deal with the problem of delayed reimbursement claims and enacted the following provision:

> (b)(1) The amendment made by subsection (a) shall be effective only in the case of claims filed on account of expenditures made in calendar quarters commencing on or after October 1, 1979.
>
> (2) In the case of claims filed prior to the date of enactment of this Act on account of expenditures described in section 1132 of the Social Security Act made in calendar quarters commencing prior to October 1, 1979, there shall be no time limit for the payment of such claims.

(3) *In the case of such expenditures made in calendar quarters commencing prior to October 1, 1979, for which no claim has been filed on or before the date of enactment of this Act, payment shall not be made under this Act on account of any such expenditure unless claim therefore is filed (in such form and manner as the Secretary shall by regulation prescribe) prior to January 1, 1981.*

(4) The provisions of this subsection shall not be applied so as to deny payment with respect to any expenditure involving adjustments to prior year costs or court-ordered retroactive payments or audit exceptions. The Secretary may waive the requirements of paragraph (3) in the same manner as under section 1132(b) of the Social Security Act.

(c) *Notwithstanding any other provision of law, there shall be no time limit for the filing or payment of such claims except as provided in this section, unless such other provision of law, in imposing such a time limitation, specifically, exempts such filing or payment from the provisions of this section.*

Pub. L. 96-272, 94 Stat. 500, 530 (Section 306 of the Adoption Assistance and Child Welfare Act of 1980) (to be codified at 42 U.S.C. § 1320b-2) (emphasis added).

As authorized by Section 306(4), the Secretary extended the deadline in Section 306(b)(3) from January 1, 1981, to May 15, 1981. 46 Fed. Reg. 3528. Plaintiff States in this action complied with that deadline.

B. *FY 1981 Continuing Appropriations Resolution*

As has become customary, the Senate had yet to pass a House approved appropriations bill for HHS as FY 1980 drew to a close and FY 1981 was about to begin. To enable the Federal government to continue its operations while Congress completed action on specific appropriations acts, Congress enacted the Act of October 1, 1980, P.L. 96-369, 94 Stat. 1351, which contained the following provision:

> Whenever an Act listed in this subsection has been passed by only the House as of October 1, 1980, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the House, whichever is lower, *and under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1980*, except section 210 of title II of the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriations Act, 1980 (H.R. 4389) as adopted by the House of Representatives on August 2, 1979, and except for title III of the Agriculture, Rural Development and Related Agencies Appropriations Act, the programs in which shall continue at the rate of operations as provided for in the House-passed appropriation bill for fiscal year 1981. [Emphasis added.]

P.L. 96-369 expired on December 15, 1980, but the same provision as that underlined above was included in P.L. 96-536, which extended funding to the end of FY 1981 on September 30, 1981.

The appropriations provision for 1980 which was incorporated by reference into the 1981 appropriations resolution in the underlined language, had incorporated by reference into it provisions of H.R. 4389, 96th Cong., 1st Sess. H.R. 4389, which alone was never enacted into law, prohibited the use of appropriated funds to pay reimbursement claims under Titles IV, XVI, XIX and XX of the Social Security Act if reimbursement was claimed more than a year after expenditures. In other words, the FY 1981 appropriations measures, through double incorporation by reference, prohibit the use of HHS appropriations to pay claims filed more than a year after State expenditures. This limitation forms the basis for Defendants' refusal to pay Plaintiffs' claims *See* 46 Fed. Reg. 46135 (September 7, 1981)

(HHS regulation embodying appropriations restriction on payment of claims).

II. Statutory Relationship

The States argue that subsection 306(c) of the Social Security Act requires that any subsequent provision of law which changes the time period for filing or payment of reimbursement claims must specifically refer to Section 306. Plaintiffs point out that the time period limitation in the FY 1981 appropriations resolutions nowhere refers to Section 306 and is thus invalid. Plaintiffs argue that Defendants must pay valid timely-filed claims out of FY 1981 appropriations.

Defendants assert that the restriction on the use of appropriated funds does not purport to change the time periods contained in Section 306. Rather, Defendants state that it is a restriction on the availability of appropriated funds and nothing more. The time period for filing claims is unchanged according to HHS. It is not contended that the claims filed by the States on or before May 15, 1981 were untimely.

The Defendants point out that an authorizing statute such as the Social Security Act will often permit expenditures but that a subsequent appropriations measure may not allow expenditures to the full extent of the authorization, due to budgetary limitations. That, Defendants argue, is precisely what is presented in this case: Section 306 permits payment of Plaintiffs' claims from funds if appropriated. Defendants do not allege that a change in Section 306 has occurred; they contend that the claims timely filed under Section 306 are subject to restricted appropriations.

Plaintiffs counter by referring to the legislative history underlying Section 306 and specifically referring to that underlying subsection 306(c). The States claim that Subsection 306(c) was drafted to prevent general provisions of subsequently enacted appropriations acts from

altering the limitations rules set forth in Section 306. Both sides agree that Subsection 306(c) was drafted because H.R. 4389, the language of which forms the appropriations restriction for FY 1981, was pending at the time Section 306 was passed. Defendants argue that Subsection 306(c) was not drafted to prevent later-enacted appropriations bills from altering the time periods for claim-filing unless they referred to Section 306, but rather, was enacted to prevent any confusion as to what the *substantive* law was on claim filing in the unlikely event that H.R. 4389 was passed in the same session as Section 306.

Defendants' interpretation is consistent with the legislative history of Subsection 306(c). Appropriations bills are often vehicles for amendment of substantive law. *City of Los Angeles* v. *Adams*, 181 U.S. App. D.C. 163, 172, 556 F.2d 40, 49 (1977). Since later enacted legislation generally controls earlier enacted provisions, Congress wanted to make clear that Section 306 expressed substantive law and that Section 306 would not be changed as substantive law by the then pending appropriations measure, H.R. 4389, unless H.R. 4389 so stated. *See* 125 *Cong. Rec.* S 6940 (daily ed. June 13, 1980) (comments of Senator Moynihan). In that light, Plaintiffs' contentions are untenable that subsection 306(c) was designed to control or limit all subsequent appropriations bills or that it controlled the continuing appropriations resolutions for FY 1981. Furthermore, Plaintiffs could not cite the Court to one instance where Congress set out to control yearly appropriations in an authorizing statute. The absence of any precedent is not surprising, for to limit the appropriations process in an authorizing statute would play havoc with the appropriations process and would drastically alter the legislative structure. If that is what Congress intended to do with Subsection 306(c), it appears to the Court that it would have so stated.

III. CONCLUSION

The claims filed by the Plaintiff States were timely under Section 306. The Defendants will be unable to pay them with FY 1981 appropriations. The statute of limitations of Section 306 having been satisfied, the claims having been filed, and assuming the validity of the claims, it is only a matter of funds availability before the claims may be paid. That is a matter left to Congress. U.S. Const. Art. I, § 9, cl. 7. This Court is unable to compel Defendants to pay money that has not been appropriated by Congress. *Reeside* v. *Walker*, 52 U.S. (11 How.) 286, 307 (1850).

An appropriate Order follows this Memorandum Opinion.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

Date: SEPTEMBER 30, 1981

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 81-2237

STATE OF CONNECTICUT, ET AL., PLAINTIFFS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

FILED SEP 30 1981

ORDER

Upon consideration of the Memorandum Opinion filed this date and the entire record herein, it is by the Court this 30th day of September, 1981,

ORDERED, that this case be and is hereby DISMISSED, for Plaintiffs' failure to state a claim for which relief may be granted.

/S/ AUBREY E. ROBINSON, JR.
United States District Judge

No. 82-1058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners

v.

STATE OF CONNECTICUT, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Congress, when making reference in a continuing appropriations resolution to a pending bill as a means of establishing the extent and manner of appropriations for fiscal year 1982, thereby also enacted into permanent law provisions of the pending bill relating to other fiscal years.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1058

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners

v.

STATE OF CONNECTICUT, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This Brief in Opposition to the Petition for a Writ of Certiorari is submitted on behalf of the States of Connecticut, Illinois, Maryland, Michigan, New Jersey, New York, Oklahoma, Pennsylvania, and Wisconsin, plaintiffs-appellants below, and the State of California, intervening plaintiff and appellant below.

The decision of the Court of Appeals for the District of Columbia Circuit (Circuit Judges Edwards and Bork, and District Judge Bonsal) resolved in respondents' favor the dispute over interpretation of the fiscal year 1981 appropriations laws. The petition does not seek review of the decision on this issue; rather, it rests solely upon the claimed failure of the Court of Appeals to apply a provi-

sion allegedly incorporated by reference into a continuing appropriations resolution for fiscal year 1982. The petition suggests the Court consider summary reversal.

We show in this brief that the provision relied upon in the petition never became law, directly or by incorporation in another statute, and cannot provide a basis for challenging the decision of the Court of Appeals. In addition, subsequent to the Court of Appeals' decision, the Congress rejected efforts to adopt by statute the very position urged in the petition, and instead enacted a further provision that established a framework for payment of the state claims that are the subject of this litigation.

Accordingly, there is no cause for either summary reversal or plenary review by this Court. The legal point advanced in the petition is without merit, and in any case the intervening action by Congress resolves this issue and emphasizes the absence of any need for issuance of a writ of certiorari.

OPINIONS BELOW

In addition to the opinions and orders appended to the petition for a writ of certiorari, the Court of Appeals issued an order dated November 19, 1982, which is reprinted in Appendix A, pp. 1a-2a.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions quoted in the petition, this case involves the following statutory provisions:

1. *Third Fiscal 1982 Continuing Appropriations Resolution.* The Joint Resolution of December 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, provided in relevant part:

> "That the following sums are appropriated . . . for the several departments of the Government for the fiscal year 1982, and for other purposes, namely:
>
> "Sec. 101. (a) (1) Such amounts as may be necessary for projects or activities . . . for which appro-

priations . . . would be available in the following appropriations Acts:

. . .

"Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1982;

. . . .

"(2) Appropriations made by this subsection shall be available to the extent and in the manner which would be provided by the pertinent appropriation Act."

2. *First Fiscal 1983 Continuing Appropriations Resolution.* Section 136 of the Joint Resolution of October 2, 1982, Pub. L. 97-276, 96 Stat. 1186, 1197-98, provides:

"Notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in Connecticut against Schweiker (No. 81-2090, July 27, 1982), section 306 of Public Law 96-272, or section 1132 of the Social Security Act, no payment shall be made, in or with respect to any fiscal year prior to fiscal year 1984, under this or any other Act, and no court shall award or enforce any payment (whether or not pursuant to such decision) from amounts appropriated by this or any other Act, to reimburse State or local expenditures made prior to October 1, 1978, under title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act, unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred. After fiscal year 1983, any payment made to reimburse such State or local expenditures required to be reimbursed by a court decision in any case filed prior to September 30, 1982, shall be made in accordance with a schedule, to be established under the Social Security Act, over fiscal years 1984 through 1986."

STATEMENT

The following is a summary of the relevant facts. The decision of the Court of Appeals (Appendix A to the petition) contains a more detailed factual statement.

1. *Claims Covered By The Dispute*

The respondent states participate in various Social Security Act matching fund programs that provide welfare and health assistance to persons in need. Traditionally, federal funds (known as federal financial participation or "FFP") have been made available to states on a current basis to insure that the programs are sufficiently financed. However, it is not uncommon for states to seek FFP for past-period expenditures where the entire cost was borne by the state initially and FFP was not sought on a current basis. This can occur for various reasons: states are frequently required to exhaust other potential funding sources for medical services before turning to the Medicaid program; internal audits or reviews disclose expenditures subject to FFP that were not identified when the current period claims were calculated; changes in federal policy can indicate eligibility for FFP of expenditures thought previously to be ineligible. This case involves an effort by the Secretary to avoid payment of certain back claims of the states, without regard to their underlying merit.

2. *Adoption of Time Limits for Filing Back Claims*

Until very recently, there was no time limit on the submission of FFP claims by states. But in reporting H.R. 4389, the fiscal year 1980 appropriations bill for the Department of Health, Education, and Welfare (now known as the Department of Health and Human Services ("DHHS")), the appropriations committees of the respective Houses of Congress included a limitation precluding the use of the funds appropriated for that year to pay any state claim for FFP with respect to pre-September 30, 1978, expenditures, unless the claim had been

submitted within one year after the state expenditure was incurred. H.R. 4389 was never enacted into law. However, the limitation took effect as a condition to the use of fiscal year 1980 funds by virtue of the fiscal year 1980 Continuing Appropriations Resolutions, which maintained funding for the Department for the year subject to the terms of H.R. 4389. Pub. L. 96-86, 93 Stat. 656 (1979); Pub. L. 96-123, 93 Stat. 923 (1979).

The time limitation provision in H.R. 4389 concerned states because of its potential impact on their legitimate claims for FFP. State concerns were expressed during hearings of the Senate Finance Committee on an omnibus bill to revise the Social Security Act.[1] The Committee responded by adding to the bill a provision that, after further floor amendment in the Senate and adoption by the Conference Committee, became section 306 of the Adoption Assistance and Child Welfare Act of 1980. Pub. L. 96-272, § 306, 94 Stat. 500, 530-31 (reprinted in part at pages 2-3 of the petition). This section established prospective time limits for submission of state claims for FFP. It permitted processing and payment of claims already on file and established a specific time limit for filing claims for past expenditures that had not yet been filed. The section was intended to nullify the limitation in H.R. 4389 (*see* Pet., App. pp. 24a-30a), and it specifically stated that its provisions were not to be modified except by statute expressly referring to section 306.

3. *The 1981 Continuing Appropriations Resolutions*

Congress was again unable to agree on an appropriations bill for the Department for fiscal 1981, and once again continuing resolutions became the Department's source of funds. The 1981 resolutions referred for funding levels and conditions to the applicable appropriations

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[1] *See* Hearings on H.R. 3434 before the Subcommittee on Public Assistance of the Senate Committee on Finance, 96th Cong., 1st Sess. (1979), pp. 2, 124-28.

laws for fiscal 1980. *See* Pub. L. 96-369, § 101(a)(2), 94 Stat. 1351 (1980); Pub. L. 96-536, § 101(a)(2), 94 Stat. 3166 (1980); Pub. L. 97-12, § 401, 95 Stat. 14, 95 (1981). For DHHS, this meant the 1980 continuing resolutions, which in turn had referred to the terms of H.R. 4389.

The Department took the view that this "double incorporation" included the time limitation on filing of state claims contained in H.R. 4389, so that 1981 appropriated funds could not be used to pay pre-September 30, 1978, claims even if they were filed in compliance with the timetable established in section 306. The states responded that section 306 was expressly intended to nullify the limitation of H.R. 4389, and that the reference in the 1981 continuing resolution to H.R. 4389 (via the reference to 1980 appropriations laws) meant H.R. 4389 as modified by section 306. They also showed that neither the 1981 resolution nor the provisions it referred to met the requirement of section 306 that section 306 be cited expressly in any modifying statute.

This suit was instituted by the states against the Secretary and the Department on September 15, 1981, to resolve the controversy.[2] After submission of pleadings and a hearing on September 28, the District Court on September 30, 1981, decided for the Secretary. The Court of Appeals reversed, and, in an extensive opinion that considered all of the applicable statutory provisions and other legislative materials, adopted the interpretation of

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[2] A rulemaking proceeding had been in process for the preceding several months to consider a proposed regulation embracing the DHHS interpretation of the fiscal 1981 appropriations laws. The plaintiff states had participated in the rulemaking proceeding. Suit was filed on September 15 because of the approaching end of the fiscal year. On September 17, DHHS made final the proposed regulation. *See* Pet., App. pp. 10a-11a.

the states.[3] The court held that section 306 of Public Law 96-272 "was intended to nullify the time limit in H.R. 4389," and it rejected the Secretary's contention that section 306(c) was irrelevant to the construction of an appropriations resolution. Pet., App. pp. 30a, 34a. The petition for a writ of certiorari does not seek review of the Court of Appeals' resolution of the merits of the dispute. Pet., pp. 4, 14, n.11.

4. *The 1982 Continuing Appropriations Resolutions*

While this case was pending, the House passed H.R. 4560, covering appropriations to the Department for fiscal 1982. The bill contained a provision (section 208), on which the petition for a writ of certiorari is based, stating that "notwithstanding section 306 of Public Law 96-272 . . . no payment shall be made from this or any other appropriation" to reimburse any state expenditure made before October 1, 1978, unless a claim was filed within one year after the year in which the expenditure occurred. Although the Senate Appropriations Committee reported a bill with an identical provision, the bill never came to the Senate floor. Thus, for yet another year, it was necessary to fund the Department by continuing appropriations resolutions.

On December 15, 1981, the third continuing resolution for fiscal year 1982 became law (Pub. L. 97-92).[4] Section 101(a), reprinted in pertinent part at pages 2-3, above, appropriated funds for several departments for fiscal year 1982, including DHHS, for "projects or activities" that would have been covered by the "pertinent" appropria-

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[3] The petition, pp. 11-12, does not adequately describe the Court of Appeals' opinion. We invite attention to the opinion itself, especially pages 14a-21a, 29a-36a and 40a-41a of the appendix to the petition.

[4] Two earlier resolutions had maintained the Department's funding from October 1 to December 15, 1981. *See* Pub. L. 97-51, 95 Stat. 958 (1981); Pub. L. 97-85, 95 Stat. 1098 (1981).

tions Acts, "to the extent and in the manner which would be provided by" the "pertinent" Act.[5] The operative language of this law, so far as DHHS was concerned, was the same as had been contained in the first two continuing resolutions for fiscal year 1982. But because the House in the interim had enacted H.R. 4560 and the Senate Appropriations Committee had reported its version of the bill, these bills had become the "pertinent" bills to which the resolution referred.[6]

The Secretary's brief to the Court of Appeals cited Public Law 97-92, and argued (on the last page) that the reference to "any other appropriation" in section 208 of H.R. 4560 precluded any relief for the states. The states replied that Public Law 97-92 applied only to the use of funds appropriated for fiscal 1982, and had no legal effect with respect to any other year's funds, including the funds for 1981, which are the subject of this case. Appellants' Reply Br., p. 20, n.*. While the Court of Appeals gave effect to H.R. 4560 (as referred to by Public Law 97-92) for fiscal year 1982 (Pet., App. pp. 33a-34a), it rejected the Secretary's argument that the 1982 continuing resolution also served to bar use of 1981 funds. *Id.*, p. 41a, n.36.

The Secretary petitioned for rehearing and requested *en banc* consideration. His petition raised only the question of applicability to 1981 funds of the third 1982 continuing resolution (Public Law 97-92)—the same question presented to this Court. The petition for rehearing argued that the limitation of H.R. 4560 was incorporated

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[5] This law carried an expiration date of March 31, 1982. By Public Law 97-161, 96 Stat. 22, passed on March 31, 1982, the expiration date was extended to September 30, 1982, thus covering the balance of the fiscal year.

[6] Under the first two resolutions for fiscal year 1982 (*see* note 4, page 7, above), DHHS appropriations were continued on the same basis as the previous year, in the absence of enactment of H.R. 4560 by either House by October 1, 1981.

in toto into Public Law 97-92, and that this limitation, through its reference to "any other appropriation," extinguished the state claims that are the subject of this litigation. The petition was denied by the panel, and none of the eleven active judges on the court agreed with the suggestion for *en banc* consideration. Pet., App. pp. 45a, 46a.

5. ***The 1983 Continuing Appropriations Resolutions***

Congress was unable to complete the 1983 appropriations bill for the Department before the end of its regular session in Fall 1982. Accordingly, a continuing appropriations resolution was adopted by the House on September 16, 1982, covering DHHS, among other departments. When the bill (H.J. Res. 599) was reported by the Senate Appropriations Committee on September 23, 1982, it included a new provision (section 133), not contained in the House-passed resolution, prohibiting the payment from "this or any other Act" of any state claim for FFP in expenditures incurred prior to October 1, 1978, unless the claim had been submitted within one year after the year in which the expenditure was incurred. The accompanying report (S. Rep. No. 97-581, 97th Cong., 2d Sess., p. 14) stated that the purpose of the added provision was to overturn the decision of the Court of Appeals and to give effect to the limitation that had been contained in section 208 of H.R. 4560 and on which the Secretary relies in the petition for a writ of certiorari. It further stated that all claims not meeting the one-year filing deadline—the claims at issue in this case—were to be "permanently extinguished." *See* App. B, pp. 3a-4a.

This provision was strongly resisted on the Senate floor and it did not pass. Many Senators pointed out that the claims in question had been submitted within the time limits established in section 306 of Public Law 96-272, and objected to the effort to undo the solution to the time limitation issue that Congress had adopted in section 306. They also stressed the unfairness of extinguishing states'

rights to payment of legitimate claims, and objected to the last-minute, ex parte manner in which the issue had been raised. 128 Cong. Rec. S12487-90, S12498-99, S12609, S12912 (daily eds. Sept. 29 and 30, 1982). Ultimately, a compromise was reached which rejected the proposal to extinguish the states' claims by precluding payment out of any appropriation. Instead, it was provided that no outlay would be made to pay for any of the back claims until fiscal year 1984, but if the Court of Appeals' decision became final, payment would be made over a three-year period pursuant to a schedule to be adopted under the Social Security Act. *Id.* at S12498-99 (daily ed. Sept. 29, 1982). Both sides in the debate stressed that the compromise solution was not intended to prejudice the Court of Appeals' decision. *Id.* at S12498.

The Senate compromise was adopted in conference with one minor technical amendment and became section 136 of Public Law 97-276, the first continuing appropriations resolution for fiscal year 1983. The conference report (the only portion of this legislative history referred to in the petition for a writ of certiorari) repeated the understanding that section 136 (unlike the provision initially proposed) was not intended to prejudice the Court of Appeals' decision.[7] H.R. Rep. No. 97-914, 97th Cong., 2d Sess. (1982), pp. 23-24.[8]

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[7] The precise words of the statute in this respect are:

> "After fiscal year 1983, any payment made to reimburse such State or local expenditures *required to be reimbursed by a court decision* in any case filed prior to September 30, 1982, shall be made in accordance with a schedule, to be established under the Social Security Act, over fiscal years 1984 through 1986." (Emphasis supplied.)

While this statute does not preclude further review of the Court of Appeals' decision, it establishes the framework for payment of the states' claims on the premise that the decision will become final.

[8] Section 136 is reprinted at page 3 above. The relevant passages from the floor debates and the Conference Report, cited above, are

[Footnote continued]

In recognition that section 136 of Public Law 97-276 represents a solution of the problem of payment of the state back claims, the second continuing appropriations resolution for fiscal year 1983 (which, unlike all prior continuing resolutions, contains the full text of a DHHS appropriation law) omits any provision limiting use of the funds appropriated to pay the state back claims. Pub. L. 97-377, 96 Stat. 1830 (1982).

Subsequent to the enactment of section 136, the Secretary sought a stay of issuance of mandate from the Court of Appeals pending the submission of his certiorari petition.[9] The court denied the motion, citing section 136 of Public Law 97-276 and noting that commencement of the proceedings on remand to fashion the proper relief was appropriate in light of "Congress's direction that payments begin approximately October 1, 1983." App. A pp. 1a-2a.

The petition for a writ of certiorari followed.

ARGUMENT

The petition for a writ of certiorari and its suggestion of summary reversal rest entirely on the premise that the Congress, as part of the third 1982 continuing appropriations resolution (Pub. L. 97-92), enacted a law prohibiting payment of the claims in question from any funding source, thereby effectively extinguishing the states' rights to receive FFP from any source, including fiscal 1981 appropriations, for the expenditures represented by the claims. The error attributed to the Court of Appeals, described in the petition as "egregious," is

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reproduced in the plaintiff states' Opposition to the Motion for Stay of Mandate filed on October 4, 1982, in the Court of Appeals, which was also appended to their Opposition to the Motion to Extend Stay of Mandate, filed November 2, 1982.

[9] The court had earlier granted the Secretary's request for a stay of mandate for thirty days to permit the Solicitor General to decide whether to submit a petition for a writ of certiorari.

the court's failure so to read and apply the third 1982 continuing resolution.

The petition's premise is false. Congress has never enacted the law relied on by the Secretary, directly or indirectly. H.R. 4560, which contains section 208 on which the Secretary relies, was referred to in the third 1982 continuing resolution *only* to establish the amount and conditions of appropriations made for fiscal year 1982. The third 1982 continuing resolution had no effect on funds appropriated in 1981.

Moreover, on the two occasions when Congress has given plenary consideration to the subject here involved, it has acted to preserve the states' entitlement to have their back claims considered on their merits and paid to the extent valid. In its most recent consideration of the subject, it squarely rejected the view advanced in the Secretary's petition and refused to overturn the decision of the Court of Appeals. Instead, it established a framework for payment of the claims in question.

If the term "egregious" has any application in this case, it would be to describe the Secretary's maintenance of an unprecedented position that valid rights to FFP in expenditures incurred in accordance with federal promises of reimbursement should be obliterated, notwithstanding the considered refusal of Congress to approve such a course.

1. In arguing that the third 1982 continuing appropriations resolution (Public Law 97-92) reflects a Congressional intention "to prevent payment of respondents' claims from *any* existing funding source, not merely 1982 appropriated funds," the petition admonishes that analysis must begin with "the language employed by Congress in Pub. L. No. 97-92." Pet., p. 13. We agree. Not only does the "language employed" (which is reprinted at pages 2-3 above) not contain the provision that the petition attributes to the law, it precludes any indirect incorporation by reference of the provision.

The statute (Public Law 97-92) makes appropriations "for the fiscal year 1982" for projects and activities covered in specified appropriations laws that had not been enacted in their own right, including the appropriation for DHHS. The statute makes the funds appropriated for 1982 available "to the extent and in the manner which would be provided in the pertinent appropriation Act." There is nothing else in the statute that incorporates by reference any pending bill. Any conclusion that a provision in H.R. 4560 pertaining to other years' funds was enacted into law must derive from these words of Public Law 97-92.

The Secretary's case assumes that these words of Public Law 97-92 incorporated the entirety of H.R. 4560 into law. That is certainly incorrect. As can be seen, H.R. 4560 is referred to for only one purpose—to determine the "extent" and "manner" of the appropriation of *1982 funds*. The provision of section 208 of H.R. 4560 on which the Secretary relies—the prohibition on use of funds from "any other appropriation" to pay the state claims in question—has nothing to do with the extent and manner of the appropriation for 1982. It was therefore not encompassed by "the language employed by Congress in Pub. L. No. 97-92," if the "ordinary meaning of the words used" is followed. *See* Pet., p. 13.

Nothing in the legislative record suggests that the references to H.R. 4560 should be read any more expansively than is indicated by the limited words used in Public Law 97-92. When it enacted Public Law 97-92 Congress was doing no more than extending a "stopgap" funding law in order to prevent a cessation of government operations. It was not purporting to deal with substantive matters, beyond those expressly covered by other sections of the statute.[10] In the case of DHHS,

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[10] Many substantive matters were dealt with in separate sections of Public Law 97-92. For example, there were substantive amend-

[Footnote continued]

the language of the third continuing resolution was identical to what had been used in the first continuing resolution for fiscal 1982 (Pub. L. 97-51, extended by Pub. L. 97-85).[11] It is not reasonable to believe that this limited action to keep the government functioning also had the effect of withdrawing the states' entitlement to be paid for claims that the Congress had, only one year before (in section 306 of Public Law 97-272), specifically sought to preserve.[12]

Apart from the limited reference effected by the plain words of Public Law 97-92, the strongest evidence that the provision relied on by the Secretary was not enacted

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ments to the Medicaid provisions of the Social Security Act (section 118); additional conditions to the receipt of education grant funds were established (section 124). In the first 1983 continuing appropriations resolution (Pub. L. 97-276), Congress dealt squarely with the subject of this litigation in a separate section (section 136). These instances constitute further evidence that Congress did not intend in the third 1982 resolution, where there was no separate section dealing with this subject, to adopt the prohibition applicable to all funding sources that the Secretary seeks to read into the law.

[11] At this time H.R. 4560 had not passed the House, so that the referent to determine the level and terms of the Department's 1982 appropriation was the 1981 appropriation. *See* p. 8, note 6 above.

[12] Even where there is ambiguity concerning whether a provision in an appropriations statute is intended as permanent law or only as a limitation on use of funds for a particular year, settled principles of statutory construction require interpreting the provision only as a restriction on use of the particular appropriation. This is because Congress' rules forbid substantive legislation via appropriations bills, and although Congress has the power to legislate in disregard of these rules, courts will presume that Congress has not violated its own rules where any doubt exists. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 190-91 (1978); *see also* Andrus v. Sierra Club, 442 U.S. 347, 359-61 (1979). This is a particularly strong case for concluding that Congress did not intend to enact permanent law by way of an appropriations statute, because no statutory ambiguity is involved; it is clear from the face of Public Law 97-92 that Congress referred to H.R. 4560 solely as a source of standards for the expenditure of 1982 funds.

into law is the manner in which Congress dealt with the provision when its attention was drawn to it. This occurred in September 1982, when an effort was made to have Congress specifically add a section to the first 1983 continuing resolution that would prohibit use of appropriations under "this or any other Act" to pay the state claims in issue. The proposed section was expressly intended to give effect to section 208 of H.R. 4560 and to overrule the decision of the Court of Appeals. *See* App. B pp. 3a-4a. The proposal was rejected, over the Secretary's objections (expressed by Senator Schmitt in the debates), precisely because it would achieve the objective sought by the petition to this Court—elimination of funding sources for legitimate claims for FFP filed in compliance with the timing standards established by Congress in section 306 of Public Law 96-272.[13] Typical of the objections to the Secretary's proposal was the statement of Senator Heinz, who led the opposition effort. After recounting the history of the dispute, including the Court of Appeals' decision, he stated:

> "This last-ditch effort by HHS, one that I consider to be an underhanded method, will override the bill we passed in 1980. It will override the Federal courts' decision. It will change the rules after the game is over—a change that will cost the States $382 million.
>
> "Mr. President, this unprecedented provision repudiates the basic Federal-State agreement at the heart of social security matching programs: The states right to reimbursement of their Federal share of funds States spent in reliance on congressional promise of Federal matching. This not only is outrageously unfair in this particular instance, but this sets a very dangerous precedent for future relations

[13] *See* the Senate debate (cited at page 10 above), particularly the statements of Senators Heinz, Moynihan, Bradley, Danforth, Dole, D'Amato, and Brady, all of whom strongly objected to the proposed section embracing the result contended for in the Secretary's petition.

> between the Federal Government and the States. And the real losers will be the beneficiaries." 128 Cong. Rec. at S12498 (daily ed. Sept. 29, 1982).

In short, all the pertinent evidence—the words of the third 1982 resolution, the circumstances surrounding that resolution, and the prior and subsequent actions by Congress on the issue of payment of the states' back claims —supports the conclusion that the Congress has *never* adopted as law the provision of section 208 of H.R. 4560 that the Secretary says was incorporated into Public Law 97-92. The Secretary's presumption that Public Law 97-92 had this effect—on which his entire petition rests —is without basis.

2. This case is not certworthy. It presents no conflict in circuit decisions. There is no suggestion that a decision of this Court has been ignored or was not followed. The underlying question is narrow, as the Court of Appeals recognized (Pet., pp. 15a, 35a). It relates only to the availability of funds appropriated for fiscal year 1981, to the extent that any such funds remained unobligated at the end of that year. The potential maximum amount involved ($382 million for the ten states involved) is not insignificant; but the actual amount to be paid depends on the allowability of the various claims on the merits.[14] The Court of Appeals committed no error in sustaining the states' position and rejecting the Secretary's statutory arguments.

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[14] Many of the claims have been processed and disallowed, in whole or in part, on their merits. On January 3, 1983, the plaintiff and intervenor-plaintiff states submitted reports to the Department showing that, as of that date, more than $138 million of the claims had been disallowed by the Department. The Department has represented to the District Court in the remand proceeding that it will complete processing of all the ten states' claims by March 31, 1983. For those that have been or will be disallowed, states have an option of seeking administrative review by a Board established by the Secretary for that purpose.

Apart from all this, review by this Court is not warranted because Congress focused specifically on this issue after the decision of the Court of Appeals and adopted a compromise solution that contemplates payment of the state claims in issue from remaining 1981 appropriated funds (as well as any later sums that may be appropriated). The compromise grew out of the efforts (described at pages 9-10 and 15-16 above) to overturn the Court of Appeals' decision and enact the very provision that the Secretary now claims should be enforced by this Court. After many Senators criticized the Senate Appropriations Committee proposal and defended the states' entitlement to payment of legitimate claims for FFP that were submitted in accordance with the timetable adopted by Congress in section 306 of Public Law 96-272, Senator Schmitt attempted to defend the proposal (which the Secretary supported), asserting that payment of the back claims in 1983 could result in reduced funding for other discretionary programs. 128 Cong. Rec. at S12489 (daily ed. Sept. 29, 1982). While not agreeing with this contention, Senator Heinz and others endeavored to resolve the issue by agreement, and after a break in the debate the compromise was announced that delayed the commencement of payment until fiscal year 1984. *Id.* at S12490, S12498. As the Court of Appeals observed (App. A pp. 1a-2a), the compromise solution contemplates commencement of payments on October 1, 1983, assuming that the decision below becomes final. The Congressional solution represents an unambiguous rejection of the Secretary's efforts to remove the remaining 1981 appropriated funds as a source of payment of the back claims.

While the Congressional solution does not preclude Supreme Court review of the decision below, it strongly argues against granting the petition that has been filed, for that petition does *not* seek review of the Court of Appeals' resolution of the issue of interpretation of the 1981 appropriations laws, but instead seeks only to revive the very proposal that has just been resoundingly rejected

by Congress. Section 208 of H.R. 4560 on which the petition is predicated is identical in substance to the provision that was reported in the Senate Appropriations Committee version of the 1983 continuing resolution,[15] was so strongly opposed on the Senate floor, and was eventually discarded in favor of the compromise solution reflected in section 136 of Public Law 97-92. Certiorari jurisdiction ought not be exercised to sustain a position so recently and definitively rejected by the Congress.

The recent Congressional action, as well as the absence of any of the traditional grounds for Supreme Court review, the incorrectness of the one legal argument advanced in the petition, and the failure of the petition to challenge the decision below in any other respect, all demonstrate that this case is not worthy of review.

3. The petition asserts that a constitutional issue lurks in the case (Pet., pp. (I), 2, 12-13), citing Article I, Section 9, Clause 7, of the Constitution. This suggestion is baseless. The sole issue presented is one of statutory interpretation. The Court of Appeals' clearly correct decision on that issue in no way impinges on the exclusive constitutional power of Congress to appropriate moneys.

There *is* a constitutional issue underlying this case, but it would be posed only if the Secretary's position were accepted. The Secretary's contention—that Congress may effectively extinguish states' entitlements by refusing to provide any funding source to reimburse expenditures incurred in accordance with statutory commitments to supply federal matching funds—raises substantial questions as to the limits of the Congressional spending power under Article I, Section 8. This subject was broached in *Pennhurst State School & Hospital* v. *Halderman*, 451

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[15] The Senate report recites that the Committee's purpose was to give effect to Section 208 of H.R. 4560. S. Rep. No. 97-581 at p. 14 (App. B pp. 3a-4a).

U.S. 1 (1981). But since the Secretary's statutory argument in this case is so deficient, the Court need not wrestle with the spending power limitation questions implicit in the Secretary's position.

Finally, the petition (p. 17) chastises the Court of Appeals for invoking principles of equity to sustain the states' entitlement to payment from remaining 1981 appropriated funds despite the alleged action of Congress to withdraw these funds. This misstates the decision. The Court below invoked the principle, adopted in previous cases, that filing suit before the close of a fiscal year serves to prevent the lapse of unobligated appropriations notwithstanding a failure of the District Court to award appropriate injunctive relief before the end of the fiscal year, if that failure is later determined to be erroneous. *See Jacksonville Port Authority* v. *Adams*, 556 F.2d 52 (D.C. Cir. 1977).[16] The Secretary argued to the Court of Appeals that the refusal to permit the use of 1982 funds for payment of the claims in issue was a reason for not applying the anti-lapse rulings of the prior cases. It was *that* argument that the court below found wanting in equity. Pet., App. pp. 40a-41a.[17]

CONCLUSION

This Court has resorted to summary reversal on the basis of the certiorari papers in certain cases where the decision below "is so clearly erroneous as to make oral argument a waste of time" or where the case is "clearly

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[16] The petition does not seek review of this issue.

[17] The petition includes an extended discussion of the principle that courts must ordinarily apply the law in effect at the time decision is rendered, including any new statutes that have been enacted while the case is pending. Pet., pp. 14-17. We do not dispute this principle. In this case, it supports denial of the petition. The law *now* in effect, section 136 of Public Law 97-276 (which the petition virtually ignores), represents a resolution of the issue tendered by the petition in a manner contrary to the position advanced by the Secretary. (*See* pp. 15-16 and 17 above).

controlled by one or more of [the Court's] recent decisions." R. Stern & E. Gressman, Supreme Court Practice 362-63 (5th ed. 1978). In this case, the petition does not rest on a claimed inconsistency with past decisions of this Court, and the decision below was not clearly erroneous, but rather clearly correct. Moreover, the supervening action by the Congress in fashioning a compromise solution of the underlying problem eliminates any need or justification for further consideration by this Court.

For these reasons, the respondent states respectfully request that the Court decline the invitation to consider summary disposition and instead deny the petition for a writ of certiorari.

Respectfully submitted,

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January 1983

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

CA 81-02237

No. 81-2090

STATE OF CONNECTICUT, *et al.*,

and

STATE OF CALIFORNIA,
pltf-intervenor,
v. *Appellants*

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

Before: Edwards and Bork, Circuit Judges; Dudley B. Bonsal *, Senior District Judge for the Southern District of New York

ORDER

Upon consideration of appellees' motion to extend stay of mandate, of the opposition of nine appellant states to said motion and of appellees' reply, it is

ORDERED, by the Court, that appellees' motion to extend stay of mandate is denied. Congress having directed in Pub. L. No. 97-276 that a schedule be established for the payment, over fiscal years 1984 through 1986, of any

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

claims legally required to be paid, and the Solicitor General having decided to file a petition for certiorari, the district court should, upon receipt of the mandate, consider the nature and length of the discovery and other proceedings needed to process the claims at issue and should, in order to accommodate potentially conflicting goals and to respect the legitimate concerns expressed by both parties, take whatever action is appropriate simultaneously to promote compliance with Congress's direction that payments begin approximately October 1, 1983, and to minimize any burden to the parties and to the court that may prove unnecessary in the event of Supreme Court review. And, it is

FURTHER ORDERED, by the Court, that the Clerk shall issue the mandate herein to the District Court forthwith.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

EXCERPT FROM SENATE REPORT NO. 97-581, 97th CONG., 2d SESS., SEPTEMBER 23, 1982, ON CONTINUING APPROPRIATIONS FOR 1983 (REPORT TO ACCOMPANY H.J. RES. 599)

— 14 —

SOCIAL SECURITY CLAIMS

Section 133. On July 27, 1982, the U.S. Court of Appeals for the District of Columbia Circuit, in *Connecticut* v. *Schweiker*, decided that the United States remained liable for the payment of $382,000,000 in claims asserted by the States and arising from their participation in the AFDC, medicaid, social services, and related or predecessor programs through which the States received Federal financial assistance from the Department of Health and Human Services (HHS) under various titles of the Social Security Act. Many of these claims, although presented for the first time in 1980 and 1981, are extremely old, in one case going back nearly 30 years to expenditures incurred in fiscal year 1954. HHS had refused to process them on the ground that they had not been filed within time limits established by the 1981 appropriation laws.

The Committee is advised that the court in its ruling gave inadequate weight to effect on these claims of language that appears in identical form in both the House and Senate versions of the Labor-HHS-Education appropriation bill, H.R. 4560, as incorporated by reference into the last continuing resolution for fiscal year 1982, Public Law 97-92. That language reads:

> Sec. [208] *207.* Notwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act, no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under

> title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within 1 year after the fiscal year in which the expenditure occurred.

The Committee recommends this section of the bill to clarify the congressional intent, as expressed in the quoted language, that the claims in question are to be paid only if they had been formally filed with HHS within 1 year after the fiscal year in which the expenditure occurred. If a claim does not meet this criterion, it is to be permanently extinguished.

No. 82-1058

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1058

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In our petition, we demonstrated that the court of appeals impermissibly intruded on the exclusive constitutional authority of Congress by ordering the Secretary of HHS to pay respondents' claims out of FY 1981 funds notwithstanding Congress' clear instructions that those claims not be paid from "this [FY 1982] or any other appropriation" (Pet. 12-14). We pointed out that neither respondents nor the court of appeals had ever offered any explanation for their refusal to acknowledge the force of Congress' unambiguous language (*id.* at 10-11, 13). Curiously, respondents still have not ascribed any meaning to the phrase "or any other appropriation." Instead, they advance the remarkable, and wholly erroneous, contention that "Congress has never enacted the law relied on by the Secretary, directly or indirectly" (Br. in Opp. 12). Respondents further

contend that, in any event, Congress resolved the controversy over payment of their claims in their favor during the FY 1983 appropriations process (*id.* at 17-18). Respondents are in error on both counts.

1. Respondents argue that Pub. L. No. 97-92 only referenced H.R. 4560 "to determine the 'extent' and 'manner' of the appropriation of *1982 funds*" (Br. in Opp. 13; emphasis in original). Respondents' limited view of Congress' intent in enacting Pub. L. No. 97-92 is based upon a fundamental misunderstanding of the significance of continuing resolutions in the appropriations process.

Continuing resolutions do more than provide "stop-gap" funding necessary to keep the government operating in the absence of regular appropriations acts. Continuing resolutions also are intended to preserve any agreements that Congress has reached during the appropriations process, even if the bills embodying those agreements have not been enacted into law. Stated simply, if a particular provision in an appropriations bill has advanced to a certain point in the legislative process, Congress provides in the relevant continuing resolution that the provision shall be treated as law. Section 101(a)(5) of Pub. L. No. 97-92, 95 Stat. 1185, states this principle in reverse fashion:

> No provision which is included in an appropriation Act enumerated in this subsection but which was not included in the applicable appropriation Act of 1981, * * * shall be applicable to any appropriation, fund, or authority provided in the joint resolution unless such provision shall have been included in identical form in such bill as enacted by both the House and the Senate.

In this manner, Congress preserves its ability to reach compromises when it returns to the regular appropriations process. Thus, for example, when the two Houses are in disagreement about particular amounts, or applicable

terms, conditions and restrictions, a continuing resolution will contain a provision, such as Section 101(a)(3) of Pub. L. No. 97-92, 95 Stat. 1183, specifying that the "lesser amount or the more restrictive authority" shall apply. No such limitation is necessary, however, when the two Houses have already reached agreement.

That is the situation here. Section 208 of H.R. 4560, 97th Cong., 1st Sess. (1981), the provision at issue in this suit, was in fact "enacted" by both the House and the Senate in identical fashion.[1] Therefore, under the principle established by Section 101(a)(5) of Pub. L. No. 97-92, 95 Stat. 1185, Congress understood and intended that Section 208 of H.R. 4560, which bars payment of respondents' claims "from this or any other appropriation," would become law just as surely as if it had been included expressly in Pub. L. No. 97-92, or in a regular appropriations act, or in what respondents refer to as "substantive" legislation (Br. in Opp. 13-14 & nn. 10, 12).[2] Even the court of appeals

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[1]H.R. 4560, including Section 208, passed the House of Representatives on October 6, 1981. See 127 Cong. Rec. H7097 (daily ed. Oct. 6, 1981). The Senate version of H.R. 4560, containing an identical provision, was reported by the Senate Appropriations Committee to the full Senate on November 9, 1981. See 127 Cong. Rec. S13145 (daily ed. Nov. 9, 1981). Section 101(a)(3) of Pub. L. No. 97-92, 95 Stat. 1183, provided that "when an Act listed in this subsection has been reported to a House but not passed by that House as of December 15, 1981, it shall be deemed as having been passed by that House." Thus, H.R. 4560 is deemed to have passed the Senate by virtue of its having been reported out of committee.

[2]Contrary to respondents' suggestion (Br. in Opp. 14 n.12), Congress routinely includes "substantive" provisions in appropriations acts and continuing resolutions, and the House Report indicates that Section 208 of H.R. 4560 was just such a provision. See H.R. Rep. No. 97-251, 97th Cong., 1st Sess. 126-127 (1981). Nor is there any question that substantive legal rights may be affected by means of provisions in appropriations acts. See *United States* v. *Will*, 449 U.S. 200, 222 (1980). Moreover, although the inclusion of a substantive provision in a

readily admitted—as respondents refuse to do—that Section 208 of H.R. 4560 was incorporated into Pub. L. No. 97-92 (Pet. App. 40a-41a & n.36).[3]

As the Court noted in *United States* v. *Will*, 449 U.S. 200, 222 (1980), the sweep of legislative action taken in an appropriations vehicle is determined by reference to congressional intent. Here, the intent of Congress is plain—notwithstanding the time limits set forth in Section 306 of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 530-531, "prior-period" claims filed more than one year after the fiscal year in which the expenditure occurred are not payable from Pub. L. No. 97-92 "or any other appropriation." Any other conclusion would wholly frustrate Congress' goal because, as we noted in our petition (at 15 n.13), the *only* claims that could have

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"general appropriation bill" is subject to a procedural objection (H.R. Rule XXI.2), no basis for objection exists when the identical provision is found in a continuing resolution. See H.R. Doc. No. 95-403, 95th Cong., 2d Sess. § 835, at 526-527 (1979).

[3]Respondents' position is that a continuing resolution may not affect appropriations other than those necessary during the time period expressly covered by the continuing resolution. But the Comptroller General of the United States has ruled that the general provisions of a continuing resolution must be read to incorporate the more specific provisions of unenacted bills, even when the effect is to extend the scope of the continuing resolution beyond its express terms. For example, in Decision No. B-199966 (Sept. 10, 1980) (reprinted as an appendix to this brief), the pertinent continuing resolution provided that the funds appropriated would remain available until September 30, 1980, at the latest. The incorporated unenacted bill, on the other hand, provided that funds for foreign economic assistance loans would remain available until September 30, 1981. The Comptroller General concluded that the specific terms of the underlying bill should govern over the more general terms of the continuing resolution, even though that had the effect of extending the continuing resolution a year beyond its express terms. Here, too, the fact that Pub. L. No. 97-92 is concerned generally with 1982 monies cannot override the more specific provision in Section 208 of H.R. 4560, which precludes payment of respondents' claims from "any" appropriation.

been affected by Pub. L. No. 97-92 are those involved in this litigation. Respondents' argument thus leads to a totally implausible result: respondents and the court of appeals concede (Br. in Opp. 12; Pet. App. 33a-34a) that Congress enacted a provision prohibiting payment out of 1982 funds of hundreds of millions of dollars in claims, yet they would also conclude that Congress simultaneously created a "loophole" permitting payment of those same claims out of 1981 funds. See *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947) (respondents "would * * * impute to Congress a purpose to paralyze with one hand what it sought to promote with the other"). This Court should not sanction such clear disregard for congressional intent.[4]

2. Respondents stand the intent of Congress on its head when they argue (Br. in Opp. 17-18) that "[c]ertiorari jurisdiction ought not be exercised to sustain a position so recently and definitively rejected by the Congress." In fact, Congress has done nothing more than place the matter in abeyance pending a decision by this Court.

Congress undertook consideration of the first continuing resolution for FY 1983—which eventually became Pub. L. No. 97-276, 96 Stat. 1186—after the court of appeals had ruled that respondents were entitled to be paid out of FY 1981 funds. In response to that decision, the Senate Committee on Appropriations proposed language to reaffirm Congress' intent that respondents' claims were not to be paid "[n]otwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in

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[4]Contrary to respondents' suggestion (Br. in Opp. 16 n. 14), the significance of this case is not diminished by HHS's initial disallowance of some of respondents' claims. As respondents note (*ibid.*), they may seek review of those disallowances, and we do not interpret their footnote as suggesting a waiver of their right to review.

Connecticut v. *Schweiker*." H.R.J. Res. 599, 97th Cong., 2d Sess. 14 (1982). The committee recommended this language because "the court [of appeals] in its ruling gave inadequate weight to [the] effect on these claims of language that appears in identical form in both the House and Senate versions of the Labor-HHS-Education appropriation bill, H.R. 4560, as incorporated by reference into the last continuing resolution for fiscal year 1982, Public Law 97-92." S. Rep. No. 97-581, 97th Cong., 2d Sess. 14 (1982). The committee further stated that the purpose of its proposal was to clarify Congress' intent that state claims not meeting the one-year filing limitation incorporated by Pub. L. No. 97-92 were to be regarded as "permanently extinguished" (*ibid.*).

When the proposal of the Appropriations Committee reached the floor of the Senate, it was met with vigorous objection from Senators representing the states involved in this litigation. As a result, the Senate adopted alternative language that, after further modification by the Conference Committee, was enacted as Section 136 of Pub. L. No. 97-276, 96 Stat. 1197-1198. Section 136 (set forth at page 3 of the Brief in Opposition) bars payment of respondents' claims out of *any* appropriations during FY 1983. Thereafter, claims "*required to be reimbursed by a court decision*" may be paid, but only following establishment of a schedule for extended payment over a three-year period. Thus, contrary to respondents' assertions (Br. in Opp. 17-18), the language of Section 136 does nothing more than suspend payment of respondents' claims, which could amount to as much as $382 million, pending this Court's review.

That Section 136 did nothing more than place the payment issue in abeyance is clear from the colloquy on the floor of the Senate at the time it was being considered. Even Senator Heinz—whom respondents characterize as the leader of the opposition to the Appropriations Committee's

proposal (Br. in Opp. 15)—acknowledged that the compromise language that became Section 136 was not "intended to prejudice in any way, any court cases involving this matter * * *." 128 Cong. Rec. S12499 (daily ed. Sept. 29, 1982). See also *id.* at S12498 (remarks of Sen. Schmitt); *id.* at S12609 (remarks of Sen. Dole).

In addition to the plain language of Section 136 and the remarks of Senator Heinz and others explaining the limited purpose of Section 136, respondents' position is belied by the Conference Report, which specifically noted "the possibility of Supreme Court review or other court action affecting the eventual payment by the government of these sums." H.R. Conf. Rep. No. 97-914, 97th Cong., 2d Sess. 24 (1982). The report further noted (*ibid.*, emphasis added):

> The language agreed to is not intended to prejudice the outcome of this court case either on behalf of the government or for the States. *The position of the Congress on this issue has already been amply expressed through its action on the fiscal year 1980, 1981 and 1982 appropriations bills and related continuing resolutions.* The amendment is, however, intended to prohibit payment of any of these claims during fiscal year 1983. *If the courts determine that payments must be made*, the language agreed to provides a procedure for orderly payment of claims over a 3 year period beginning in fiscal year 1984.

Respondents thus completely misread Section 136 and its legislative history in arguing that the petition should not be granted because it "seeks only to revive the very proposal that has just been resoundingly rejected by Congress" (Br. in Opp. 17-18). On the contrary, the legislative history of Section 136 not only reflects Congress' understanding that the government might seek review in this Court but also confirms the fact that Congress thought it had already acted

to bar payment of respondents' claims in prior appropriations bills and continuing resolutions, including, of course, Pub. L. No. 97-92. Given both the plain language of Section 136 and its legislative history, it is difficult to understand how respondents find any comfort, much less support for their position, from its enactment.

3. Finally, there is no need for the Court to concern itself with the constitutional question that respondents find lurking in this case (Br. in Opp. 18-19). As we noted in our petition (at 16), this case does not present the question whether respondents have an absolute entitlement to reimbursement or whether, as respondents erroneously phrase the matter, their "valid rights * * * should be obliterated" (Br. in Opp. 12). Respondents sought to have their claims paid only out of FY 1981 funds, and those are the only funds covered by the court of appeals' decision (see Br. in Opp. 8). Respondents cannot seriously contend that the limits of Congress' power under the Spending Clause of the Constitution are in any way implicated by congressional refusal to pay their claims out of a particular year's funds, especially when respondents themselves have, in some instances, delayed as long as 30 years in submitting their claims (see Br. for Appellees 59 & n.6).

On the other hand, this case does raise grave concerns regarding Congress' plenary control over the federal fisc. The court of appeals' refusal to honor Congress' clear direction that respondents' reimbursement claims not be paid out of FY 1981 funds requires correction by this Court.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02

APPENDIX

DECISION — **THE COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D.C. 20548**

FILE: B-199966 — DATE: September 10, 1980

MATTER OF: Period of Availability of Foreign Assistance Loan Funds Appropriated by Fiscal Year 1980 Continuing Resolution

DIGEST:

1. Funds appropriated for development assistance loans by fiscal year 1980 continuing resolution remain available for obligation through September 30, 1981. Specific designation in House bill, incorporated by reference in continuing resolution, of two year period of availability of loan funds is exception to general provision in resolution that all funds appropriated thereby are available for only one year.

2. Funds appropriated for foreign assistance for fiscal year 1980 by continuing resolution are subject to limitation that no more than 15 percent of amount of appropriation may be obligated or reserved during the last month of availability.

The General Counsel of the Agency for International Development has requested our opinion on two questions arising under the "Joint Resolution Making further continuing appropriations for the fiscal year 1980, and for other

purposes," Public Law 96-123, 93 Stat. 923 (continuing resolution). First he asks whether funds appropriated for foreign economic assistance loans are available beyond the end of fiscal year 1980. Second, he asks whether the limitation on the percentage of an appropriation which can be obligated in the final month of availability, contained in the fiscal year 1979 appropriation act for foreign assistance (as well in the House-passed foreign assistance appropriations act for fiscal year 1980), applies to funds appropriated by the current continuing resolution.

For the reasons indicated below, we conclude (1) that foreign assistance loan funds appropriated by the continuing resolution are available until September 30, 1981; and (2) that the limit on final month obligations applies to foreign assistance funds appropriated for fiscal year 1980 by the continuing resolution.

Question 1

Section 101(a) of the continuing resolution appropriates:

> "(1) Such amounts as may be necessary for continuing projects or activities (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1979 and for which appropriations, funds or other authority would be available in the following appropriation Acts:
>
> "Foreign Assistance and Related Programs Appropriations Act, 1980 * * *."

This appropriation is further defined as follows:

> "(2) Appropriations made by this subsection shall be available to the extent and in the manner which would be provided by the pertinent appropriation Act * * *.

* * * * *

"(4) Whenever an Act listed in this subsection has been pased by only one House as of October 1, 1979, or where an item is included in only one version of an Act as passed by both Houses as of October 1, 1979, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1979 * * *."

The Foreign Assistance and Related Programs Appropriation Act, 1980, H.R. 4473, 96th Congress, was passed by the House of Representatives on September 6, 1979. It was not passed by the Senate prior to October 1, 1979.

Title II of H.R. 4473, as it passed the House, contained appropriations of funds for development assistance under sections 103, 104(b), 104(c), 105, and 106 of the Foreign Assistance Act of 1951, as amended. Each of the appropriations contained the following proviso:

"*Provided*, That the amounts provided for loans to carry out the purposes of this paragraph shall remain available for obligation until September 30, 1981."

Thus, under H.R. 4473, funds appropriated for development assistance loans were to be available for two years—fiscal years 1980 and 1981.

The two-year period of availability of development assistance loan funds was incorporated into the continuing resolution either under paragraph 101(a)(2) ("to the extent and in the manner which would be provided by the pertinent appropriation act"), or under paragraph 101(a)(4)

("the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the action of the one House").

On the other hand, section 102 of the continuing resolution provides:

> "Appropriations and funds made available and authority granted pursuant to this joint resolution shall be available from November 20, 1979, and shall remain available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) enactment of the applicable appropriation Act by both Houses without any provision for such project or activity, or (c) September 30, 1980, whichever first occurs."

There is thus a contradiction, concerning the period of availability of these funds, between the provisions incorporated by section 101(a) and section 102 of the continuing resolution. Under section 101(a), funds appropriated for development assistance loans are to be available until September 30, 1981. Under section 102, however, all funds appropriated by the continuing resolution are to be available only until September 30, 1980.

We have long followed the principle of statutory construction that, when there is seeming conflict between a general statutory provision and a specific statutory provision, and the general provision is broad enough to include the subject matter to which the specific provision relates, the specific provision will be considered an exception to the general provision. *See, e.g.*, B-194063, May 4, 1979; B-163375, September 2, 1971. In this way, we can give effect to both provisions.

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In the present situation, section 102 of the continuing resolution applies to all the appropriations, funds, and authority made available or granted by it. The provision of H.R. 4473, incorporated into the resolution by section 101(a), applies only to funds appropriated for development assistance loans. Thus, section 102 is the general provision, and the provision under section 101(a) is the specific provision. Under the rule of statutory constructions set forth above, it follows that funds appropriated by the continuing resolution are generally available only until September 30, 1980, except for funds appropriated by title II of H.R. 4473 for development assistance loans which are specifically made available until September 30, 1981.

Question 2

Section 502 of H.R. 4473, as it passed the House of Representatives, provides:

> "Except for the appropriations entitled 'International disaster assistance' and 'United States emergency refugee and migration assistance fund', not more than 15 per centum of any appropriation item made available by this Act for fiscal year 1980 shall be obligated or reserved during the last month of availability."

A similar provision, applying to funds appropriated for fiscal year 1979 was contained in section 102 of the Foreign Assistance and Related Programs Appropriation Act, 1979, Pub. L. No. 95-481, 92 Stat. 1595.

The General Counsel specifically asks whether the limitation contained in the fiscal year 1979 appropriations act applies to funds appropriated by the fiscal year 1980 continuing resolution. His question arises because of the portion of section 101(a)(4) of the resolution which provides

that projects in an appropriations act which has passed only one House of the Congress shall be continued "* * * under the authority and conditions provided in applicable appropriation Acts for the fiscal year 1979."

We do not consider it necessary to answer the General Counsel's question as phrased, because it is our opinion that the 15 percent last-month spending limitation contained in H.R. 4473 applies to foreign assistance funds appropriated for fiscal year 1980 by the continuing resolution.

Paragraph (4) of section 101(a) of the continuing resolution contains two instructions for determining the appropriation for projects contained in an act which has passed only one House of the Congress. First, it states that these projects shall be continued

> "under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower * * *."

Second; as quoted above, it provides that the project shall be continued under the authority and conditions contained in the act appropriating funds for the same program for fiscal year 1979.

We interpret these two instructions as applying to two different types of provisions, which may be contained in appropriations acts. The first applies to fiscal provisions; that is, provisions relating to the amount of the appropriation and its period of availability. The second applies to program provisions; that is, provisions controlling the purposes for which the appropriation is, or is not, available.

Under our interpretation, we look at the fiscal year 1980 appropriations act as it passed the one House to determine the fiscal provisions of the appropriation. We look to the

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corresponding fiscal year 1979 appropriations act to determine the program provisions applicable to the appropriation.

A limitation on the percentage of an appropriation that may be obligated or reserved during any particular time period is a limitation on the period of availability of the appropriation, and therefore a fiscal provision.

Under our interpretation of section 101(a)(4) of the continuing resolution, fiscal provisions contained in H.R. 4473 are incorporated into the resolution. Thus the 15 percent last-month obligation limitation contained in H.R. 4473 applies to funds appropriated by the resolution.

We conclude that, with the exceptions contained in section 502 of H.R. 4473, not more than 15 percent of the foreign assistance and related programs funds appropriated by the continuing resolution can be obligated or reserved during the last month of availability. For funds appropriated for a period of one-year, the last month of availability is September 1980. For 2-year funds, like the development assistance loans funds, the last month of availability is September 1981.

/s/ Milton J. Sokolar

For the Comptroller General
of the United States